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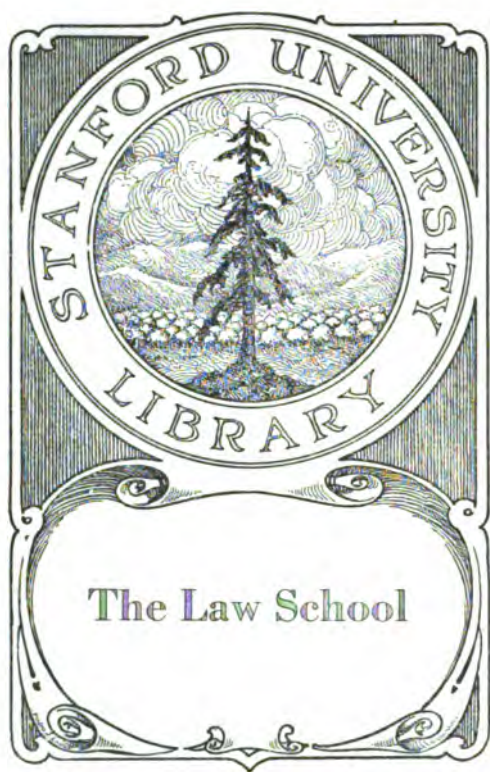
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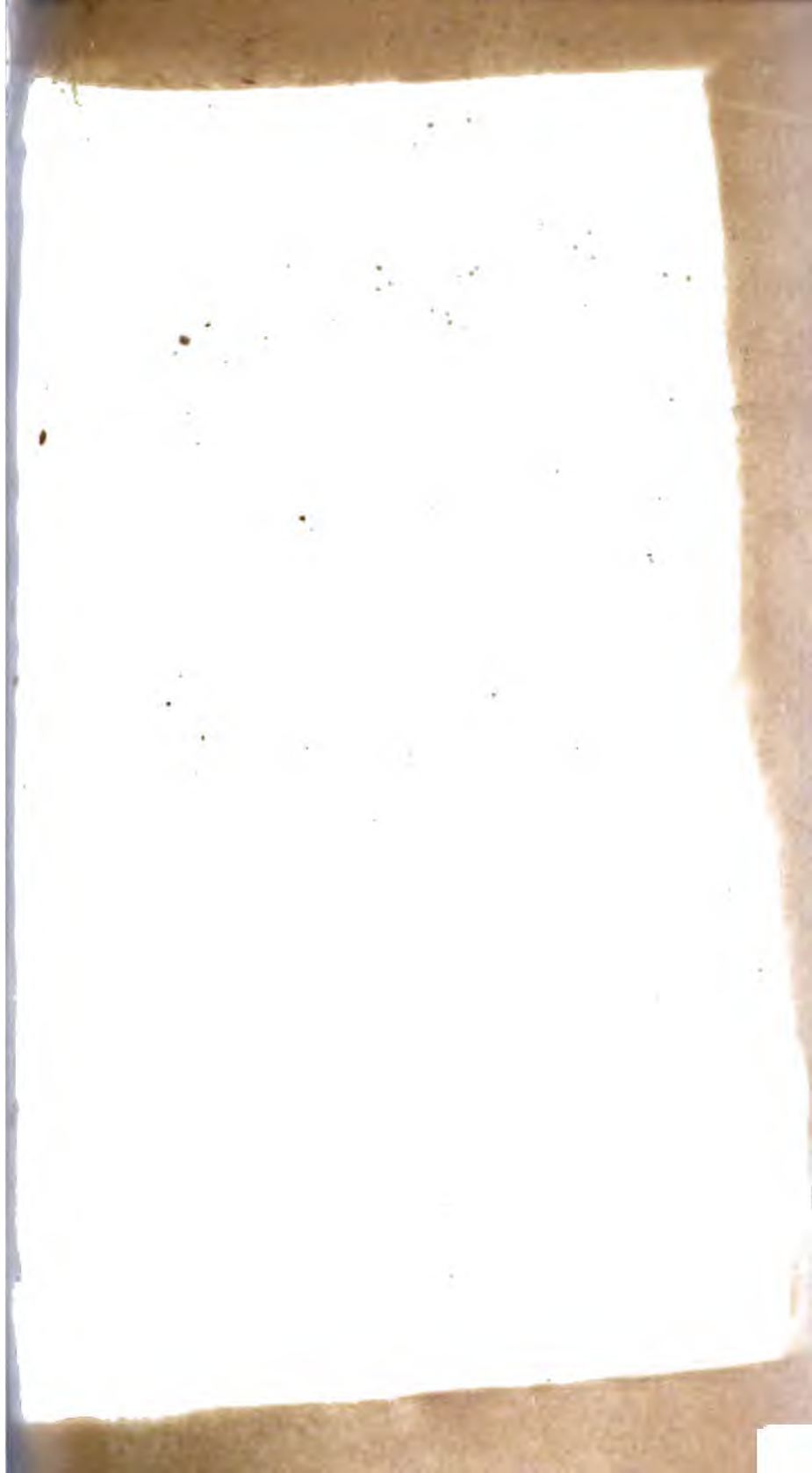
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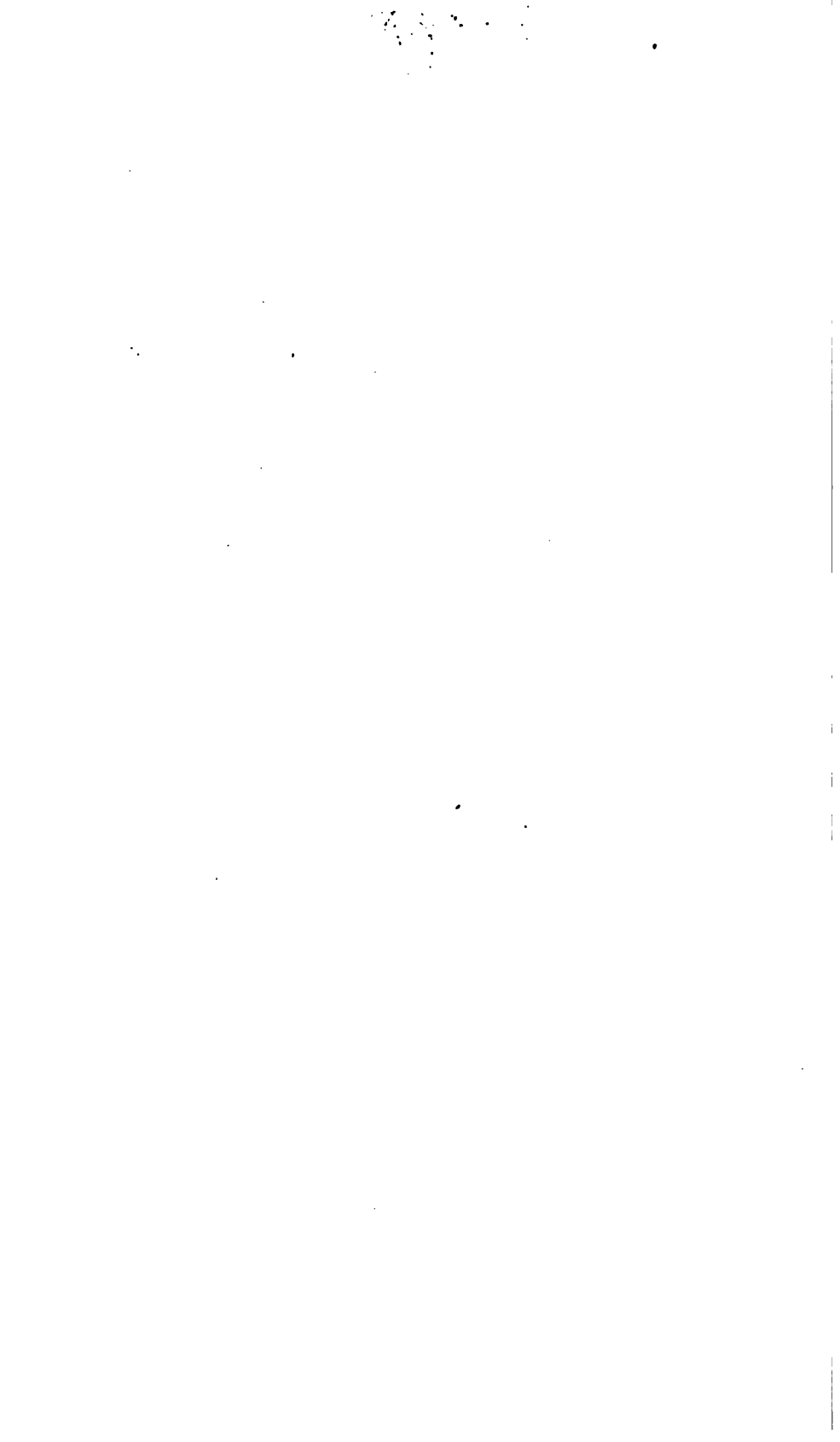
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



EDITED BY

HON. GEORGE SHARSWOOD.

VOL. LXXXIII.

CONTAINING

CASES IN THE QUEEN'S BENCH, IN HILARY VACATION, EASTER TERM AND
TRINITY TERM, 1862, XV. VICTORIA.

PHILADELPHIA:

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QUEEN'S BENCH REPORTS.

BY
JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE, ESQ.
AND
THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE, ESQ.,
BARRISTERS AT LAW.

NEW SERIES.

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JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. JOHN Lord CAMPBELL, C. J.

Sir JOHN PATTESON, Knt.

Sir JOHN TAYLOR COLERIDGE, Knt.

Sir WILLIAM WIGHTMAN, Knt.

Sir WILLIAM ERLE, Knt.

Sir CHARLES CROMPTON, Knt.

ATTORNEYS-GENERAL.

Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.

Sir FREDERICK THESIGER, Knt.

SOLICITORS-GENERAL.

Sir WILLIAM PAGE WOOD, Knt.

Sir FITZROY KELLY, Knt.

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ARGUED AND DETERMINED
THE QUEEN'S BENCH,
Hilary Vacation,

XV. VICTORIA. 1852.

THE Judges who usually sat in Banc in this Term were:—

LORD CAMPBELL, C. J.
PATTESON, J.

COLERIDGE, J.
WIGHTMAN, J.

Gillaspie

MEMORANDA.

In this Vacation,

Lord TRURO resigned the office of Lord High Chancellor.

The Right Hon. Sir EDWARD BURTONSHAW SUGDEN was appointed Lord High Chancellor, and was created a Peer by the title of Baron St. Leonards of Slaugham in the county of Sussex.

In the same Vacation,

Mr. Justice PATTESON resigned the office of a Judge of the Court of Queen's Bench. He was shortly afterwards sworn in of Her Majesty's Privy Council.

*Charles Crompton, of the Inner Temple, Esquire, was appointed a Judge of the Court of Queen's Bench, being previously advanced [*2 to the degree of the Coif, when he gave rings with the motto *Quærere verum*. He afterwards received the honour of Knighthood.

Sir Alexander James Edmund Cockburn resigned the office of Attorney-General, and was succeeded by Sir Frederick Thesiger. And Sir William Page Wood resigned the office of Solicitor-General, and was succeeded by Sir Fitzroy Kelly.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

HALLETT, GOODEN, CLARK, ALLAN, and HATFIELD, v.
DOWDALL. Feb. 3.

Declaration against five defendants stated that defendants were proprietors and shareholders of, and partners in, a company called The M. Assurance Company: that plaintiff caused to be made a policy on ship, &c., purporting that he made insurance at and from, &c., against certain risks, which the said Company were contented to bear: and it was declared and agreed by and between the Company and the assured, That the capital stock and funds of the Company should alone be liable to answer and make good all demands under the policy, and that no proprietor of the Company should be in anywise liable to any demands, nor be in anywise charged, by reason of the said policy, beyond the amount of his share in the capital stock, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietors should in all cases and under all circumstances be limited to their respective shares in such capital stock: And the policy further stated that the Company were contented, and bound themselves, to the assured for the true performance of the premises: The count then alleged that, in consideration that plaintiff had paid the premium and promised defendants to perform all things in the policy contained to be performed on his part, defendants promised plaintiff that they would become and be insurers to plaintiff of 1100*l.* on the said ship during the time in the policy mentioned, and would perform all things therein contained on their part as such insurers of 1100*l.* to be performed; and defendants then became and were insurers to plaintiff, and subscribed the policy as such insurers of 1100*l.* on the said ship. The count then averred total loss, and non-payment although the capital stock and funds of the Company had always been sufficient to pay plaintiff the 1100*l.*

One defendant demurred to the count, alleging uncertainty, and other grounds of special demurrer.

A second, J. G., pleaded Non Assumpsit; and that the stock and funds had not been and were not sufficient.

A third pleaded that the policy was made after stat. 35 G. 3, c. 63, and that defendant's name was not expressed or specified on the policy; whereby the insurance became and was null: Special demurrer, alleging that the plea was an argumentative denial of defendant's subscription.

A fourth defendant pleaded that he was proprietor of fifty shares only, of 100*l.* each, and, before action brought, had paid claims and demands upon the Company in respect of insurances, to the amount of more than 5000*l.*, of his own moneys. Demurrer to the plea as being an argumentative denial of the sufficiency of the capital stock, and as amounting to a traverse of the promise, and as uncertain.

Held by the Court of Queen's Bench:

That the policy, as set out in the declaration, showed a joint liability, capable of being enforced at law if the Company had sufficient capital stock and funds; which it appeared by the count they had: That an execution of the policy by the defendants sufficiently appeared: and that the count was good both on general and on special demurrer.

And that no material distinction arose in the case of the fourth defendant from his having paid on policies a sum equal to his subscription.

Also, as to the third defendant, that, the insurance being stated in the declaration to have been made by the Company, of which he was one, it was immaterial, since stat. 5 G. 4, c. 114, that individual subscribers were not named in the policy.

And, by Erle and Wightman, J., that his special plea was an argumentative Non Assumpsit.

On the trial of the cause, the second defendant, J. G. (no other appearing), tendered a bill of exceptions. The evidence and ruling which raised the exceptions as were follows.

The defendants were associated in a partnership for the purpose of effecting insurances; the capital to consist of 1,000,000*l.*, divided into 100*l.* shares. In fact, shares to the amount of 500,000*l.* only had been taken, upon which calls had been paid to the extent of 25*l.* per share, and a partial payment made on another call of 10*l.* The Company's deed of settlement provided that the affairs should be managed by a Board of directors, who should issue policies signed respectively by three directors (they being indemnified out of the funds), and should cause it to be stated in every policy that the subscribed capital of 1,000,000*l.*, and other the stocks, funds, and property of the Company unapplied at the time of any claim or demand,

should alone be liable to any claim under such policy; that the directors signing, or any of them, should not be responsible to the assured beyond the funds, &c., in their hands or power at the time of recovery on the policy; and that no proprietor should in any event be liable beyond the amount unpaid on his share. The deed further provided that any proprietor sued in respect of any policy might give notice to the Board, and they might take the defence upon themselves, indemnifying such proprietor; and, if they should not do so, and the proprietor should be compelled to pay the debt, and should not be reimbursed by the directors, provision was made for enabling him to recover the debt and costs against the proprietors individually. The policy in question was in the form always adopted by the Company. It was headed "M. Assurance Company. Capital, one million;" and was executed by three directors, who were stated therein to sign in witness of the premises and that the Company were content with the assurance. Defendant J. G. was a director, but did not sign. The policy was as set forth in the declaration, with clauses limiting responsibility to the capital and funds of the Company, and exempting individual shareholders, except to the amount of their respective shares, but omitting the stipulation directed by the deed, that the directors signing should not be liable beyond the funds in their hands. Evidence was given for the defendant that the Company had not, when the cause of action accrued, or afterwards, "any moneys, property, or available funds whatever in their hands" wherewith they could have satisfied plaintiff's claim. The Judge ruled that the matters proved were evidence on which the jury would be justified in finding for the plaintiff on both issues: and that the Company had available capital stock and funds while a portion of the capital stock sufficient to pay the plaintiff remained uncalled for.

Held by the Court of Exchequer Chamber, affirming the judgment in Q. B., That the first count was good on general demurrer, inasmuch as it expressly stated a joint contract made by the defendants, which might be enforced at law. Platt, B., dubitante.

That the count was also good on special demurrer, being sufficiently certain.

That the third defendant's plea, founded on stat. 35 G. 3, c. 63, was bad on general demurrer.

Judgment was also affirmed on the plea of the fourth defendant.

Held, further, in the Court of Exchequer Chamber, on the bill of exceptions:

By Talfourd, J., and Parke, Alderson, Platt, and Martin, Bs.; That there was no evidence of a joint contract by the defendants.

By Cresswell and Williams, Js.; That there was evidence of such joint contract, and of a sufficiency of capital stock and funds. And, by Cresswell, J., that the clause in the deed of settlement, exempting every proprietor from liability beyond his own unpaid subscription, was either insensible, or void as being repugnant to the rest of the deed.

Semble, by Talfourd, J., and Platt, B., and held by Martin, B., that there was evidence of a several contract by each defendant with the assured to the amount unpaid on such defendant's shares.

Quare, per Parke and Alderson, Bs., whether the policy, not being conformable to the power vested in the directors by the deed of settlement, was binding on the defendants.

A venire de novo was awarded.

ASSUMPSIT. 1st count. For that, whereas defendants (plaintiffs in error) before and at the time of the *making of the policy after [*3 mentioned, and from thence continually until and at the time of the loss after mentioned, were proprietors and shareholders of and partners in a Company called The General Maritime Assurance Company; and thereupon the plaintiff (defendant in error) heretofore, viz. on 18th November, 1846, according to the *usage and custom of merchants, [*4 caused to be made a certain policy of insurance in writing purporting thereby and containing therein that certain persons trading under the name, style, and firm of, and described therein as, W. P. Litt & Bushby, as well in their own name as for and in the name or names of all to whom the same might appertain, did make assurance and cause themselves, &c., to be assured, lost or not lost, at and from 2d August, 1846, to 1st August, 1847, &c.: the count then stated an insurance upon goods and ship, with enumeration of the risks which "the said Company" were contented to bear, &c., and liberty

reserved to the assured in case of loss, &c., to sue, labour, &c., about the defence, safeguard, and recovery, &c., without prejudice to the insurance; to the charges whereof "the said Company would contribute,

*5] according to the rate and quantity of the sum therein assured:

And it was declared and agreed by and between the said Company and the assured that the capital stock and funds of the said Company should alone be liable to answer and make good all claims and demands whatsoever under or by virtue of the said policy; and that no proprietor of the said Company, his or her heirs, executors, or administrators, should be in anywise subject or liable to any claims or demands, nor be in anywise charged, by reason of the said policy, beyond the amount of his or her share or shares in the capital stock of the said Company, it being one of the original and fundamental principles of the said Company that the responsibility of the individual proprietors should in all cases and under all circumstances be limited to their respective shares in the said capital stock: And further it was agreed by the said Company that that writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street," &c.: "And so the said Company were contented and did thereby promise and bind themselves to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due to the said Company for the said assurance by the assured at and after the rate of," &c.: The count then stated a memorandum as to average, &c., and proceeded: "Of all which premises the defendants afterwards, to wit, on," &c., "had notice; and thereupon afterwards, to wit, on the day and year aforesaid, in consideration that the plaintiff, at the request of the defendants, then paid to the defendants the sum of 92l. 8s. as a premium or reward for the insurance of 1100l. upon the said ship in the said policy of assurance mentioned

*6] during the time in the said policy mentioned, and then promised the defendants to perform and fulfil all things in the said policy of insurance contained on the part of the insured to be performed and fulfilled, the defendants then promised the plaintiff that they the defendants would become and be insurers to the plaintiff of the said sum of 1100l. upon the said ship in the said policy of insurance mentioned during the said time in the said policy mentioned, and would perform and fulfil all things in the said policy of insurance contained on their part as such insurers of the said sum of 1100l. to be performed and fulfilled; and the defendants then became and were insurers to the plaintiff, and then duly subscribed the said policy of insurance as such insurers of the said sum of 1100l. upon the said ship in the said policy in that behalf mentioned:" The count then averred interest of the plaintiff in the ship, &c.; authority of Litt & Bushby to insure for him, and that their name, &c., was inserted in the policy; and a total loss by perils of the seas during the twelve months; and it concluded: "And,

although the capital stock and funds of the said Company always from the time of the making of the said policy hitherto have been and still are sufficient to pay the plaintiff the said sum of 1100*l.* in this declaration mentioned; of all which," &c., defendants, to wit, on, &c., "had notice, and were then requested by the plaintiff to pay him the said sum of 1100*l.* so by him insured as aforesaid, and which said sum of 1100*l.* they the defendants then ought to have paid according to the form and effect of the said policy of insurance and their said promise and undertaking so by them made as aforesaid, yet the defendants have not paid the said sum of," &c., or any part, &c.

2d count, for money had and received by defendants *to the use of plaintiff, and on an account stated: promise by defendants to [*7 pay, and breach, &c.

Pleas, as follows.

By Hallett. To the 1st count: Demurrer, assigning as grounds (among others), That the count is uncertain as to the nature and terms of the contract.(a) That it appears by the count that the action does not lie against the defendants jointly, but, if liable, they should have been sued severally. That the policy, as appears by the count, made the capital stock and funds alone liable, and not any proprietor beyond the amount of his share: and that the count shows the defendants to be proprietors, and therefore not liable beyond the amount of their respective shares; therefore the action ought to have been several. That, if the plaintiff recovered in this action, one proprietor would be liable in respect of another's shares, contrary to the recited contract. That the count does not show that the defendants are or could be joint proprietors. That, consistently with the count, the defendants or some of them may, before the loss, have paid the full amount of their respective shares in the capital stock in discharge of prior claims upon that stock, and therefore may have been discharged from further liability to such claims: that the count should have shown with certainty that the whole or some part of the amount of those shares was unpaid at the time when the plaintiff's claim arose: and that the time of making the promise is not stated with sufficient certainty.(a) To the 2d count, Non Assumpsit. The plaintiff joined in demurrer, and joined issue on the Non Assumpsit.

By Gooden. 1. To both counts, Non Assumpsit. *2. To the 1st count, Denial of plaintiff's interest. 3. To the same, De- [*8 nial of the loss. 4. To the same, That the capital stock and funds of the said company have not been, nor are they, sufficient to pay plaintiff the said sum of 1100*l.* or any part thereof, in manner and form, &c. Conclusions to the country. Issues thereon.

By Clark. 1. To 1st count, that the policy, and the promise of defend-

(a) See pp. 84, 5, post.

ants, were made after the passing of stat. 35 G. 3, c. 63,^(a) and after 5th July, 1795; and that Clarke's name was not expressed or specified on the said policy or on any other policy in respect of the contract for insurance in the 1st count mentioned; whereby the said insurance became and was null, &c. Verification. 2. To 2d count, Non Assumpsit.

The plaintiff demurred to the 1st plea, on the ground that it was an argumentative denial of the allegation that Clark subscribed the policy, and that it ought to have concluded to the country. Joinder. Issue was joined on the 2d plea.

By Allan. 1. To both counts, Non Assumpsit. 2. To 1st count, that defendant was not a proprietor and shareholder, &c., in manner and form, &c. Conclusions to the country. 3. To 1st count. Plea, founded on stat. 35 G. 3, c. 63, averring, as in Clark's first plea, that Allan's name was not specified in the policy; and that he did not subscribe the same in manner and form, &c. Verification. 4. To 1st count, Denial of plaintiff's interest. 5. To the same, Denial of the loss. Conclusions to the country.

The plaintiff joined issue on pleas 1, 2, 4, 5, and demurred to plea 3 *9] on the grounds that it ought to have *concluded to the country, that it amounted to Non Assumpsit, and that it was double. Joinder.

By Hatfield. To the 1st count, That, at the time of the making of the policy, and thence continually until the commencement of this suit, defendant was, and still is, the proprietor of 50 shares of 100*l.* each in the capital stock of the said Company, and no more: and that, after the making of the policy, and before the commencement of this suit, viz., on 1st January, 1847, and on divers other days, &c., divers claims and demands to a much larger amount than 5000*l.*, viz. to the amount of 11,370*l.*, were made upon the said Company and upon defendant as such proprietor of the said Company; which said claims and demands arose from and were occasioned by divers policies of insurance theretofore, and whilst defendant was such proprietor of the said shares as aforesaid, made by and on behalf of the said Company as insurers in the way of the trade and business of insurers, which during a long space of time, viz., for ten years, next before the commencement of this suit, the said Company carried on, and which said claims and demands were respectively made by divers persons to whom the said Company had by virtue of the said policies respectively become and been insurers upon divers ships and vessels, and which said persons respectively had sustained divers losses respectively which the said Company were at the time of the payments by defendant hereinafter mentioned liable to answer for and make good; to wit, &c. (The plea then specified these claims.) And defendant saith that the said claims and demands respect-

(a) "For granting to His Majesty certain stamp duties on sea insurances."

ively being justly and truly due from the said Company as aforesaid, and being made by the said persons respectively before defendant [*10] had any notice of the premises in the first count mentioned, defendant, so being such proprietor of the said shares in the said Company as aforesaid, did, long before the commencement of this suit, viz., on, &c., pay to the said persons respectively so respectively making the said claims and demands as aforesaid, for and on account of their said respective claims and demands, divers large sums in the whole amounting to a much larger sum than 5000*l.*, viz., &c., (specifying the several payments). And defendant further saith that the said moneys so paid by him as aforesaid were his own proper moneys, and not the moneys of the said Company or of any other person whatever. And that he never hath at any time received from the said Company or from any person or persons whatever any moneys by way of contribution for or on account of the moneys so paid by him as aforesaid. Verification.

2. To the 2d count, non assumpsit.

The plaintiff demurred to plea 1 as an argumentative denial of the allegation that the capital stock, &c., were sufficient to pay plaintiff, &c., and as not confessing that defendants were jointly liable on the policy, so that it amounted to a denial of the promise; also as not being sufficiently certain with respect to the claims, &c., and as not concluding to the country. And he joined issue on plea 2. The defendant Hatfield joined in demurrer.

The demurrer in *Dowdall v. Hallett* was argued in the Court of Queen's Bench in Michaelmas term (November 20th), 1849.

Peacock, for the defendant, argued that the first count was bad on general as well as on special demurrer; and that defendant was not answerable at law as on a joint *contract, or beyond the amount of his own share. He cited *Halket v. Merchant Traders' Insurance Company*, 13 Q. B. 960 (E. C. L. R. vol. 66), as a direct authority. [ERLE, J.—There the plaintiff had judgment against the Company, who had sealed the policy, and the proceeding in question was in the nature of a sci. fa. against the individual shareholder. It was a different case from this.]

Butt, contra, was not called upon by the Court; but *Dawson v. Wrench*, 3 Exch. 859,† and *Reid v. Allan*, 4 Exch. 326,† were mentioned as authorities in favour of the plaintiff.

The other decisions cited, and arguments used, will appear sufficiently by the judgments of this Court and the Exchequer Chamber, and the arguments in the latter Court.

COLERIDGE, J.(a)—This case may be, as the defendant's counsel has said, of much general importance; but I think it is quite clear. No attempt has been made to distinguish it from *Dawson v. Wrench*, in the Court of Exchequer. It is suggested that that case may not have been

(a) Lord Denman, C. J., was absent on account of ill health.

well considered: but the Court took time for deliberation; and the opinion they intimated during the argument was confirmed by the ultimate judgment. To consider the question, however, on principle. Supposing the declaration to have shown a mutual engagement entered into by three or four insurers in the usual form, there can be no doubt that they would have been liable jointly. Is the case altered by the proviso "that the capital stock and funds of the said *Company *12] should alone be liable to answer" all claims and demands under the policy, and that no proprietor should be liable, by reason of the policy, beyond the amount of his own share? The expression, that the capital stock and funds shall be liable, must be understood with reference to the subject-matter. We must notice that the Company are a body from time to time insuring and meeting losses, and that they look, not merely to the nominal capital, but to that which may be their fund from time to time, varying in amount, and being, in effect, whatever may be their joint stock and capital not expended for other purposes. Then, the meaning of the policy is, not that, in the event of the nominal fund failing, no one shall be further liable, but that no one shall be answerable beyond the amount of his shares, it being a fundamental rule of the Company "that the responsibility of the individual proprietors" be in all cases "limited to their respective shares in the said capital stock:" and so it is, if the capital stock alone be liable, for then no one proprietor will be liable beyond what he has or ought to have paid up. So far, then, the engagement is a joint one, and nothing else: we undertake, but only to the extent of the capital fund. That made it material to aver in the declaration that there were a capital stock and funds available: and the declaration does so allege, which prevents the qualification relied upon from having any effect as an answer to the action. The defendants have agreed that the fund shall be liable; there is a fund, to which that liability attaches; and they have not paid. Throughout, a joint liability appears; and the declaration is good.

*13] WIGHTMAN, J.—The declaration shows *prima facie* a *joint contract: but a stipulation is recited, that the capital stock and funds alone shall be liable. If the case rested there, it being averred that the capital stock is sufficient for the present demand, there appears no legal objection to the liability. The question is, as to the stock and funds, that is, funds arising from the joint trade, available in case of loss. The proviso might afford a defence if the capital stock and funds were not sufficient; but it is averred that they are. The latter provision "that the responsibility of the individual proprietors should" "be limited to their respective shares," is hardly material to the present case, because the endeavour here is to affect, not the defendant individually, but the funds which are in the disposition of the joint body, and are alleged to be sufficient.

ERLE, J.—The cases cited for the plaintiff are an authority upon this,

and show that there is a valid cause of action. And on principle it is clear that the judgment ought to be for the plaintiff. The duty of the Court is to give effect to the whole instrument if possible; to those clauses which are in favour of the assured as well as those which operate for the insurers. The Company receive a premium, and agree that the contract shall be "of as much force and effect as the surest writing or policy of assurance," &c., a clause to be attended to in the construction of the instrument, and which means that the Company will stand in the situation of insurers, and indemnify accordingly: but this they would not do if it could be alleged (as the defendant has done) that no action at law lay against them, and that the assured must apply to a Court of equity. The qualification, that the capital *stock and [*14 funds alone shall be liable, must be construed with the rest of the contract; and the meaning is, that the Company undertake to indemnify so long as there are capital stock or funds which they can command for the benefit of the assured. Looking to the record, we must assume that the whole Company are the defendants, for that, if they had not been so, they might have taken advantage of the omission; and we must take it also that they have funds out of which the assured might be indemnified, but that they do not choose so to employ them; for the declaration alleges that there are sufficient funds, and this defendant has not denied it. The proviso that no individual shareholder shall be liable beyond the amount of his own share merely follows up the clause limiting the general liability. If they have capital stock and choose to retain it instead of paying indemnities, it is not true that, on their being sued, individuals must be liable beyond the amount of their shares because execution may be enforced against one shareholder for more than his: for, on the assumption that there is a joint fund applicable, the individuals sustain a loss only because the Company have money in their hands which they do not choose to apply.

Judgment for plaintiff.

The demurrer in

Dowdall v. Clark was argued in the Court of Queen's Bench on the same day.

Butt, for the plaintiff, relied upon *Reid v. Allan*, *where the Court [*15 of Exchequer held that stat. 35 G. 3, c. 63, s. 11, is sufficiently complied with, since stat. 5 G. 4, c. 114, if the name of the assuring firm be expressed on the policy, though the names of the individual insurers do not appear.

Bovill, contrâ.—That case differs from the present, because it was stated there that persons (named) "duly subscribed" the policy "for and on behalf of the defendant." Here no such averment of execution is made, nor are there any words amounting to an express statement that the Company contracted: and in the allegation of mutual promises it is said that "the defendants" promised. It may be sufficient, accord-

ing to the case cited, that the general name of a Company should be stated, and not the names of its members; but at least the signature of a contract by the Company, or by their agents, should be formally averred. The plea, therefore, is good on general demurrer: and the objection taken by special demurrer is groundless, because the plea does not simply deny an averment in the declaration, but raises a defence of illegality. The general statement in the count does not necessarily mean that the defendant's name was subscribed to the policy: and it lay upon the defendant to show that the policy was not executed according to law for want of proper subscription.

Butt, contra.—The illegality is not shown. It is consistent with the plea that the policy may have been subscribed by the Company. [WIGHTMAN, J.—The plea is in effect that there was no contract. ERLE, J.—That is the effect of the averments.]

*16] *COLERIDGE, J.—This case is not distinguishable from *Reid v. Allan*. The contract of insurance appears to be made by The Maritime Assurance Company; and then, under the statutes which have been cited, individual names are not necessary.

WIGHTMAN, J.—I am of the same opinion. The plea is bad also on special demurrer, because it is an argumentative traverse, and amounts to Non assumpsit.

ERLE, J., concurred.

Judgment for plaintiff.

No counsel appeared for the defendant in *Dowdall v. Allan*. Judgment for plaintiff. In

Dowdall v. Hatfield, *Montague Smith* was to have argued for the defendant, but admitted that, if the fact of the defendant having paid to the amount of his shares did not constitute a defence (which appeared to be the result of the decision pronounced this day in *Dowdall v. Hallett*), he could not resist the demurrer.

Per Curiam,

Judgment for plaintiff.

A jury was summoned to try the issue of fact, and to assess damages on the issues upon which judgment had been given: and the cause was tried before Lord Campbell, C. J., at the London sittings after Michaelmas Term, 1850, when Gooden appeared, but the other defendants made default; and the verdict on the issues of fact was: As to Hallett, for defendant. As to Gooden, for the plaintiff on the issue upon Non *17] Assumpsit to the 1st count; for defendant on the issue *upon Non Assumpsit to the 2d count; and for the plaintiff on the other three issues. As to Clark, for the defendant. As to Allan, for the plaintiff on the issue upon Non Assumpsit to the 1st count, for defendant on the Non Assumpsit to the 2d count, and for the plaintiff on the remaining issues. As to Hatfield, for the defendant. Damages 1265*l*. Gooden tendered a bill of exceptions, the material statements in which were as follows.

That, on behalf of the plaintiff, evidence was given on the first and

last issues between him and Gooden, that, before and at the time of the making of the policy, the defendants and divers other persons were associated together for the purpose of carrying on, and did carry on, the business of insurers of ships against perils of the seas, under the name, style, and title of The General Maritime Assurance Company, and by, under, and according to the terms of a certain indenture or deed of settlement bearing date 23d April, 1840, Whereby,

After reciting that the several persons parties thereto, or those under whom they claimed, had associated themselves together into a company or partnership under the style or firm of The General Maritime Assurance Company for the purpose of effecting insurances on ships and vessels and on freight and goods, and agreed to raise for such purposes a capital of one million pounds divided into shares of 100*l.* each, and that the number of shares taken by each of the parties thereto was written opposite to his or her name and seal subscribed and affixed by him or her respectively thereto: It was witnessed and declared that the several persons parties thereto, all of whom were thereafter distinguished by the title of *proprietors, and the several other persons who should become proprietors as thereafter was mentioned, should, whilst holding shares in the capital of the Company, be, and continue until dissolved under the provisions thereafter in that behalf contained, a Company or partnership by and under the name of The General Maritime Assurance Company. That the capital of the Company should consist of 1,000,000*l.*, divided into 10,000 shares of 100*l.* each. That the business of the Company, which commenced on 20th May, 1839, might continue to be carried on although the whole of the capital might not be subscribed for and all the shares taken up; that, the sum of 5*l.* per share having been paid up, the remaining 95*l.* per share should constitute a guarantee for the obligations of the Company, and should not be called for (unless for the purpose of meeting any extraordinary demand upon the Company) without the concurrence of the proprietors. That the direction and management of the affairs and concerns of the Company should be confided to a Board of Directors consisting of not more than twenty nor less than twelve members.(a)

That, when and so often as the Board of Directors, or a daily committee, which they were enabled to appoint, should accept a proposal for an assurance to be effected with the Company, the Board should forthwith issue a policy of assurance to the person or persons making such proposal, and such assurance should be at such premiums, for such time, for such voyage, and against such risks, &c., for and against which the Board or committee should have agreed that such assurance should be effected. That the Board should be at liberty *to adopt such forms of policies, deeds, and other documents for the use of

(a) Some subsequent provisions of the deed, not material to this report, are omitted.

the Company, and to vary them from time to time, as they might think proper. That the Board should cause every policy by which an insurance should be effected with the Company to be signed and duly executed by three of the directors, and the directors signing the policies should be indemnified out of the funds or property of the Company for all liabilities in consequence thereof. That the Board should cause it to be stated in every policy by which an assurance should be effected with the Company that the subscribed capital of 1,000,000*l.*, and other the stocks, funds, and securities and property of the Company which, at the time of any claim or demand being made in respect of such policy, should remain unapplied and undisposed of in pursuance of the trusts, powers, and authorities mentioned in the deed of settlement, should alone be liable to make good all claims and demands upon the Company in respect of such policy, and that the directors signing such policy, or any of them, should not be responsible to the person to whom such policy might be issued to any greater extent than the funds or property in their hands or power at the time of recovering upon such policy should be competent to discharge, and that no proprietor should in any event whatever be liable beyond the amount of the unpaid part of his share or shares in the said subscribed capital stock of one million.

That it should be lawful for the Board of Directors to settle all losses and averages upon assurances as soon as the adjustment thereof should have taken place, or according to any rule or regulation they might think fit to establish for that purpose. That the premiums *received *20] in respect of insurances granted by the Company, and the profits arising from moneys advanced upon bottomry, mortgage, respondentia, or otherwise, and the accumulations thereof respectively, and all other profit received by or accruing to the Company, should in the first instance be the fund for answering all claims and demands upon the Company in respect of its assurances or otherwise, and the capital of the Company should not be resorted to for any such purpose until such fund should have been wholly exhausted. That, in case any extraordinary demand should at any time or times be made upon the Company, it should be lawful for the Board of Directors, for the purpose of meeting the same, from time to time to come to a resolution that all the proprietors or other holders for the time being of shares in the capital of the Company should be called upon to pay, after the expiration of three calendar months from the time of such resolution, a further instalment on each of such shares in addition to the sum or sums which might for the time being have been previously paid in respect thereof, until 100*l.* per share, exclusive of any sum which might have been returned to the proprietors, should have been paid on each of such shares.

That, whenever any such notice as thereafter mentioned should have been given to the Board of Directors or to some one or more of them, or to the secretary, &c., by any proprietor, or the husband of any female

proprietor, or the executors or administrators of any deceased proprietor, or the assignees of any bankrupt or insolvent proprietor, of any claim or demand having been made, or of any action, suit, or other proceeding having been brought, &c., against him, her, or them by any creditor or other person having or supposing *himself to have any claim or demand upon the Company, the Board of Directors should proceed [*21 without delay to take such notice into consideration, and should signify in writing to the proprietor or other person giving the notice their intention to take the said debt, claim, or demand upon themselves, and either to pay the same or defend such action, suit, or proceeding at the expense of the Company; and the proprietors or other person or persons upon or against whom any such claim or demand might be made, or such action, suit, &c., might be instituted, should be indemnified out of the funds or property of the Company from all liability in consequence thereof.

That, if any action or suit at law or in equity should be brought by any creditor or other person having or supposing himself to have any claim or demand upon the Company or upon the proprietors thereof for or in respect of any policy issued by the said Company, or of any judgment or debt due or owing by them, &c., or for any other cause, matter, or thing whatsoever relating thereto, against any proprietor, or the husband, &c., or the executors, &c., or the assignee, &c., and the proprietor, &c., against whom such action, &c., should be brought should be compelled, adjudged, or decreed to pay the debt, &c., so claimed or demanded, &c., or should sustain any loss, costs, charges, damages, and expenses in defending or resisting any such debt, claim, &c., then and in every such case the debt, claim, or demand, or the sum decreed or adjudged to be paid, and the loss, costs, &c., should be considered as a debt due and owing by the Company to the proprietor or proprietors or the person or persons by whom the same should be decreed or adjudged to be paid, or who should so pay, incur, or *sustain the same, and [*22 should be borne and paid by the several proprietors for the time being of the capital of the said Company in proportion to their respective shares or interest therein. And that, when and so soon as the costs to which any proprietor, &c., should be subject in consequence of such claim, action, &c., should have been ascertained, then and immediately thereupon, the debt, &c., or the sum decreed, &c., to be paid, and the amount of such costs, should be paid on demand by the directors or trustees for the time being of the Company, or any of them, out of the funds or property of the Company in their hands to the proprietor, &c., so decreed or adjudged to pay, &c., and should be allowed to the said directors and trustees as a payment made on account of the Company, and as if such payment had been ordered by resolution of the Board of Directors. And that, if the directors or trustees for the time

being of the Company should neglect or refuse, or should not have in their hands sufficient funds belonging to the Company to enable them, to pay within the space of fourteen days next after such demand as aforesaid should have been made upon them, the whole or any part of such debt and costs, or so much thereof as should not have been paid by the directors or trustees, should be divided by the proprietor or proprietors, or other person or persons by whom the same should have been decreed or adjudged to be paid and who should be subject or liable to pay the same, into 10,000 equal parts or shares or into as many equal parts or shares as the capital of the said Company should at that time be considered as divided into, and each and every proprietor for the time being of the said Company should, in proportion to the extent of *28] his or her share or interest *therein, pay one or more of such parts or shares upon demand to the proprietor or proprietors or other person or persons who should have paid or who should be liable to pay such debt and costs. And that, on neglect or refusal to pay such proportion, the proprietor entitled to payment should have a right of action against those in default; but not unless he should have given notice under his hand to the Board of Directors (as prescribed by the deed) of the claim or demand made upon him, and have required them to pay the same or to take such claim or demand upon themselves, and defend at the Company's expense. And, to facilitate the remedy in such cases, each and every party to the deed, severally and individually, and in proportion to his interest in the capital, but not further, did covenant with the other parties thereto, and with any two, three, or more of them jointly, and with each of them severally, to pay any party sued, &c., and adjudged, &c., to pay, or sustaining loss, &c. (after taxation and apportionment of the debt and costs as above stated), such part of the debt and costs as should be due from the covenanting party, according to his interest.

The bill of exceptions then stated that the plaintiff's counsel gave in evidence that the defendants, before the making of the policy, severally executed the said deed. That at the time of making such policy they severally held shares in the capital stock of the Company, and that Gooden was at that time a director, and a holder of 250 shares of 100l. each. That, at the last-mentioned time, John Brightman, John Fulford Owen, and Francis Chambers were also directors. That plaintiff, on 18th November, 1846, by certain persons then trading under the name, *24] style, and firm W. P. Litt & Bushby, his *agents duly authorized in that behalf, caused to be made a certain policy of assurance, which said policy was signed by the said J. Brightman, the said J. F. Owen, and the said F. Chambers, as three of the directors of the said Company, on behalf of the said Company, and was in the words, letters, and figures following:—

No. 66,261.
1100*l*.

A.
The General Maritime Assurance Company,
London,
Capital one million.
Directors,

John Brightman, Esquire, Chairman.

(The other directors, among whom were Francis Chambers and J. F. Owen, were then named: also the trustees, secretary, &c.)

"In the name of God, Amen. W. P. Litt and Bushby, as well in their own name as for and in the name or names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all, do make assurance and cause themselves and them and every of them to be assured, lost or not lost, at and from the 2d day of August, 1846, to the 1st day of August, 1847, both days inclusive, being for the space of 12 calendar months, in port and at sea, at all times," &c., "upon any kinds of good and merchandise, and also upon the body, tackle, apparel, ordnance, munition, artillery, boats, and other furniture of and in the good ship or vessel called The Vindicator, whereof is master," &c., "beginning the adventure upon the said goods and merchandise from the loading thereof on board the said ship or vessel at and upon the said ship, &c., at midnight, 1st August, 1846, and so shall continue," &c., "until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever shall be arrived," &c. "And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports," &c., "for all necessary purposes without prejudice to this assurance. The said ship, &c., goods and merchandise, &c., for so much as concerns the assured, by agreement between the assured and the Company in this policy are and shall be valued at," &c. "Touching the adventures and perils which the said Company are contented to bear and do take upon them in this voyage, they are of the seas," &c. (other perils enumerated): "and in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandise and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof the said Company will contribute according to the rate and quantity of the sum herein assured. And it is declared and agreed by and between the said Company and the assured that the [*25 capital stock and funds of the said Company shall alone be liable to answer and make good all claims and demands whatsoever under or by virtue of this policy, and that no proprietor of the said Company, his or her heirs, executors, or administrators, shall be in anywise subject or liable to any claims or demands, nor be in anywise charged by reason of this policy, beyond the amount of his or her share or shares in the capital stock of the said Company, it being one of the original and fundamental principles of the said Company that the responsibility of the individual proprietors shall in all cases and under all circumstances be limited to their respective shares in the said capital stock. And further it is agreed by the said Company that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street or in the Royal Exchange or elsewhere in London. And so the said Company are contented and do hereby promise and bind themselves and their successors to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto the said Company for this assurance by the assured at and after the rate of eight guineas per cent., to return 10*s*. per cent. for each uncommenced month if the policy be cancelled," &c. "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded." (Other stipulations followed as to average.) "In witness whereof, and that the said Company are content with this assurance for the sum of 1100*l*.,

three of the directors of the said Company have hereunto set their hands this 18th day of November in the year 1846."

(Signed) "JOHN BRIGHTMAN. J. F. OWEN. FRANCIS CHAMBERS."

It was further stated that the policy was in the form always used by The General Maritime Assurance Company. That, on 16th July, 1847, plaintiff, by his agents, gave the directors notice of abandonment of his interest in the ship, she not having been heard of since March 26th, when she sailed from Liverpool. That the Secretary to the Company replied, stating that the directors did not consider the abandonment justified: but that, on a subsequent demand, the secretary wrote and signed on the policy an adjustment as for a total loss; the amount being 1100*l*. The plaintiff's counsel further gave in evidence that 7500 *26] shares in the said capital stock of the said Company had at one time after the making of the said deed of settlement been subscribed for and held by the defendants and divers other persons respectively. That, at the time of the accruing of the cause of action in the first count mentioned, about 5000 of the said shares were held by the defendants and divers other persons respectively, the remainder of the said 7500 shares having been forfeited by death, bankruptcy, and otherwise. That calls upon the defendants and the other proprietors of shares in the said capital stock had been made, to the extent of 25*l*. per share and no more. That the last of such calls on the said proprietors was made on 29th September, 1847, and was a call of 10*l*. for each share, and was due on the 30th December, 1847. That nothing was in fact paid by the said proprietors of shares towards the funds of the Company in respect of the last-mentioned call, but that certain of the directors and proprietors of shares in the said capital stock, previously to the making of the said last call, severally advanced divers sums, in the whole amounting to 10,500*l*., towards the funds of the Company in anticipation of the said call. That the Company ceased to underwrite policies in October 1847; but that the directors continued to attend at the office of the Company, and to transact business there, for between three and four months longer; at the expiration of which time the office was given up. And thereupon plaintiff's counsel closed his case.

The bill of exceptions went on to state that the counsel for Gooden thereupon gave in evidence and proved that the Company "had not, at the time of the accruing of the cause of action in the 1st count *27] mentioned, nor at any time afterwards before the commencement of the suit, any moneys, property, or available funds whatever in their hands wherewith they could have paid or satisfied the plaintiff's claim upon the said policy, or any part thereof:" and counsel submitted to the Lord Chief Justice that, upon the several matters in evidence, he ought to direct a verdict for Gooden on the first issue; for that: 1. "No action at law would lie upon the said policy." 2. "The defendants were not jointly liable upon the said policy, but, if liable at all at

law, were only liable severally to the extent of the shares held by them individually." 3. "No action would lie upon the policy against Gooden, inasmuch as he had not signed the said policy." 4. "The promise alleged in the 1st count of the declaration had not been proved, inasmuch as the promise therein alleged was a general promise by the defendants to become and be insurers to the plaintiff, whereas the only promise to be collected from the terms of the said policy (if any promise at all was to be collected therefrom) was a promise to pay out of the capital stock and funds of the Company if they were sufficient; and that, except the said policy, no evidence of any promise had been given." 5. "The said policy was illegal and void by reason of" stat. 35 G. 3, c. 63, "inasmuch as the names of the several defendants were not expressed or specified on the said policy; and that, as the plaintiff had falsely stated in the 1st count that the defendants subscribed the said policy, the defendant J. Gooden had been unable to plead the said illegality specially, and was therefore entitled to insist upon such illegality under his first plea." (Non Assumpsit.) And counsel further *sub- [*28 mitted that, upon the matters in evidence, the Lord Chief Justice ought also to direct a verdict for the defendant Gooden upon the last issue between him and the plaintiff.

That the Lord Chief Justice delivered his opinion to the jury, that the several matters so given in evidence were evidence upon which they would be justified in finding a verdict for the plaintiff on the first issue: and he further delivered his opinion that, although the Company had no money in hand, yet in point of law they had available capital stock and funds while a portion of the capital stock sufficient to pay the plaintiff remained uncalled for. And that the matters given in evidence were evidence on which the jury would be justified in finding a verdict for the plaintiff on the last issue: and with these directions he left the first and last issues to the jury. Whereupon counsel for the defendant Gooden excepted, &c.

Judgment being entered up for the plaintiff, a writ of error was brought in the Exchequer Chamber by all the defendants, the bill of exceptions being annexed to the record. The grounds of error specially assigned were: That the first count was not sufficient in law: That Clark's first plea and Hatfield's first plea were sufficient in law: And that the rulings of the Lord Chief Justice stated in the bill of exceptions were erroneous. The plaintiff joined in error.

The writ of error was argued in last Michaelmas vacation, November 26th and December 8d.

Peacock, for the plaintiffs in error, defendants below, admitted that, after the case of *Reid v. Allan*, 4 Exch. 326,† *followed up by the decision in the Queen's Bench, the plea on stat. 35 G. 3, c. [*29 63, s. 11, could not be supported.

The declaration is bad, both on general and on special demurrer.

This is not a registered company under stat. 7 & 8 Vict. c. 110; but *Halket v. Merchant Traders' Insurance Company*, 13 Q. B. 960 (E. C. L. R. vol. 66), (which was a case under that statute) applies. There the action was against a registered Company, upon a marine policy exempting individual proprietors from liability beyond the amount of their respective shares, and making the capital funds alone liable to all charges: execution was moved for, under the statute (sect. 68), against an individual shareholder, Lord Talbot: and Lord Denman, C. J., said, "It is plain that no action would have lain against Lord Talbot on this policy, to which he is not individually a party:" and he added, referring to the words of the special clause: "In truth they have no sensible meaning at all, unless it be this, that the assured shall look to the funds of the Company alone, so far as any remedy at law extends, and that the individual subscribers shall be liable only to contribute to the funds of the Company to the amount of their respective shares, which liability must be enforced by the Company against the subscribers, either at law or in equity, as the case may be, and the enforcement of which liability may possibly be compelled by the assured by some proceeding against the Company." That decision was cited, and acted upon, in *Hassell v. Merchant Traders' Ship Loan & Insurance Association*, 4 Exch. 525,† where the proceeding (also under sect. 68 of stat. 7 & 8 Vict. c. 110) was against the same member of the same Company. If a party may limit his responsibility in a *case under
 *30] the statute, he may do so, by express stipulation, where the Company is not registered under the statute. The consequence may be that the assured may have to file a bill against the directors to compel the making of calls, and that will be the fund which he must look to: it cannot be assumed, on a policy and deed of settlement like those in the present case, that each subscriber gives a guarantee for the making of necessary calls, and for their being paid up. In *Alchorne v. Saville*, 6 B. Moore, 202, note (a) to *Andrews v. Ellison*, a case of fire insurance, the policy was executed by three trustees and directors, who thereby ordered, directed, and appointed the directors for the time being to raise and pay out of the moneys of the society, pursuant to certain deeds and settlements, the amount of total or partial loss, &c.; and the question was whether an action at law for the amount of a loss could be maintained against directors for the time being. The Court of Queen's Bench held that there was no agreement under which either the directors for the time being, or the parties who actually executed the policy, could be liable: and Abbott, C. J., said: "It" "seems to me, that the only remedy the plaintiffs have is in equity, and they cannot turn round and treat this as a covenant at law." In *Andrews v. Ellison*, 6 B. Moore, 199 (E. C. L. R. vol. 17), which may be cited on the other side, there was a declaration by the defendants, who, as directors of an insurance company, had executed a policy under seal, that

the Company should make good losses, according to their deed of settlement; and this was held to be a covenant by the defendants to pay out of the Company's funds if they should be adequate, which it was alleged they were. There was no *apportionment of individual liability there, as in the present case. [ALDERSON, B.—What do [*81 you say the contract is in this case?] Either an equitable charge merely, upon the funds of the Company; or an equitable charge on those funds with a separate agreement by each individual to pay to the extent of his capital not already paid up: but no joint liability is created. [PLATT, B.—Do you allow that there is any contract at law?] There is none. Parties may deal so. It was competent to the insurers to say in terms, "You shall have a charge upon the funds, enforceable in equity." [ALDERSON, B.—It is strange to insure a ship without any contract in law.] If there is any, it is by each shareholder separately to make good the loss to the extent of his unpaid capital. But this construction leads to much difficulty. For then, if a shareholder to the amount of 1000*l.* had paid up 500*l.*, he might be liable to the claims of fifty holders of policies, each to the amount of 500*l.*; and it would be no answer to one, that he had paid another. The better construction is, that the only persons liable are the directors, and they out of the Company's funds; the shareholders being bound among themselves to make up these funds if required, according to their respective liabilities and the sums they have already paid. A precedent for a case of this kind is found in *Dr. Salmon v. The Hamburg Company*, 1 Ca. Chan. 204, where, on bill filed by a creditor against a mercantile company having power to levy taxes upon its members, it was ordered by the House of Lords, on appeal, that process should issue out of Chancery against the Company, to compel an answer; that the Court of Chancery *should examine what the just debt was, and decree payment; [*82 and, on default, should make a decree requiring the Company to levy the amount upon every member contributory to the public charge, and pay the same over; and, if, by a time to be limited by the Court of Chancery, the money assessed should not be paid, "then and from thenceforth every person of the said Company, upon such a leviation, shall be made to be liable in his capacity to pay his quota or proportion assessed;" process to issue against any person refusing or delaying to pay his quota, "as is usual against persons charged by decree of the said Court, for any duty in their several capacities." [PLATT, B.—It would be very inconvenient that every shareholder should be made defendant in a suit in equity] The consequence which has been pointed out if every shareholder were individually liable, at law, to the amount of his unpaid quota upon each policy, is still more inconvenient. And the hardship would be even greater if they were jointly liable; for then each shareholder would be responsible at once to the whole extent of the unpaid capital, notwithstanding the exemption in the deed. One

defendant, in this case, Hatfield, has already paid more than the total amount of his shares. [PARKE, B.—The point for you to argue seems to be that, under the deed of settlement, the directors had no power to make a policy which should bind any but themselves, or perhaps the Board which gave them orders; not to bind individual shareholders. The form of the policy looks as if the assured must have had notice that that was so. You may contend that the defendants have not subscribed the policy by their agents unless the agents had power to bind *33] them personally. ALDERSON, B.—The shareholder being merely *guarantee to the directors, to the extent of his unpaid share. PARKE, B.—But the point, that you did not subscribe by your agents, is not open to you on demurrer. ALDERSON, B.—We cannot tell, on this demurrer, that you did not expressly order the directors to subscribe the policy.] The defendants may insist upon their own construction on Non Assumpsit. It is true that only one defendant, Gooden, has filed a bill of exceptions: but, if he was not a joint contractor, the objection, that one defendant too many is sued, will be available to all.

Mellish, contra.—First, as to the demurrers. The insurance declared upon is either a contract by all the defendants jointly, or no legal contract at all, or a contract by each shareholder individually. Looking to the policy as set out in the declaration, it is clear that the contract was by all the defendants jointly. The policy states an agreement between the assured and the "Company;" and the insurers appear under that name in several parts of the instrument. The only clause inconsistent with a contract in that character is the stipulation that the funds alone, and not any individual (beyond the amount of his own share), shall be liable. Even here, the agreement is on the part of the "Company;" and the construction which makes the clause consistent with the rest of the policy is, that the Company are to be liable out of the capital stock and funds, if there are funds, but that, if there are not, no individual shall be answerable beyond the amount of his share. Now it is admitted that there are funds: therefore the condition under which the Company are to be liable is fulfilled, and their engagement *34] becomes *absolute. If any proprietor is damnified, there is a stock from which he can reimburse himself. The supposition that a mere equitable charge was created is groundless. The parties have used no words creating such a charge. Nor could it have been intended to make the directors mortgagors, and so incapable of dealing with the fund. If the liability under this policy creates an equitable charge, every policy executed by the Company creates one; and then, whenever a question of average or total loss, or any other dispute upon a policy, arises, every shareholder and creditor must be made a party. No such usage has ever been set up, in the many actions which have been brought against Companies since stat. 5 G. 4, c. 114. As to the cases *Halket v. Merchant Traders' Insurance Company* is an autho-

rity for rather than against the plaintiffs. The defendants were a registered Company, against whom, undoubtedly, the action lay: the motion was for execution against an individual subscriber; and the Court held that, under a clause in the policy charging all claims and demands upon the capital stock and funds, and exempting individual proprietors, execution against an individual could not be granted. Here the defendants are not a registered Company; but they have entered into a contract of insurance by their joint name, and must be jointly liable. They have, indeed, limited the responsibility of individuals so far as the law would allow: but that attempted restriction cannot alter the nature of a contract which is essentially joint. *Hassell v. Merchant Traders' Ship Loan & Insurance Association* merely follows up the last cited decision. *Althorne v. Saville*, 6 B. Moore, 202, note (a), turned upon *peculiar words, which imported an order and not a [*35 promise, and upon the want of execution; on which grounds the case, when cited in *Andrews v. Ellison*, 6 B. Moore 199 (E. C. L. R. vol. 17), was held distinguishable; and the Court of Common Pleas there affirmed the liability of parties executing a policy, to the extent of the Insurance Company's funds, notwithstanding a provision limiting individual liability. In *Gurney v. Rawlins*, 2 M. & W. 87,† directors of an Insurance Company executed a policy, ordering and appointing that, in a certain event, "the capital stock and funds of the said Company should stand charged and be liable to pay to the executors," &c., of S. 500*l.*; and it was argued that this was not a contract, but a mere charge upon the fund. But Lord Abinger said: "No; they personally undertake to pay the money." "The defendants are liable in their own persons. The policy does not give any right against the fund itself, though, if the fund should turn out to be inadequate, they might not be liable." And Parke, B., added: "The defendants undertake by an instrument under seal that this sum of money shall be paid, if the funds prove adequate; therefore it is equivalent to a covenant to pay if J. S. go to Rome." The two last-mentioned cases were acted upon in *Dawson v. Wrench*, 8 Exch. 359.† There are instances in which an obligation has been imposed by statute to pay moneys to individuals out of corporation funds, and it has been held that those parties might maintain actions of contract against the corporations, having funds applicable; *Tilson v. The Warwick Gas Light Company*, 4 B. & C. 962 (E. C. L. R. vol. 10), *Carden v. General Cemetery Company*, 5 New Ca. 253 (E. C. L. R. vol. 85). The case of *Dr. Salmon v. The *Hamburgh Company*, 1 Ca. Chanc. 204, cannot be taken as a [*36 guide. [PARKE, B.—You need not trouble yourself to comment on that case. ALDERSON, B.—It does not seem to have been much acted upon since.] As to the suggestion (which indeed does not appear to be pressed) that each shareholder might be liable individually, that construction would leave the assured very ill guarantied; for each

shareholder, on being threatened with an action, might pay up his share and so defeat the creditor.

As to Hatfield's plea, every argument that supports the declaration shows this to be insufficient. [PLATT, B.—Mr. *Peacock* has not argued in support of this plea.]

Then, on the bill of exceptions, two questions arise. First, whether, on the face of the policy, it appears to be a joint contract by the shareholders; Secondly, whether the defendant Gooden authorized the making of such a contract. As to the first point, the language of the policy (already observed upon) speaks plainly: and the subscribing directors profess to sign only as agents for the Company. If the one clause, "And it is declared and agreed," &c., "that the capital stock," &c., "shall alone be liable," has the effect of severing the liability, it is repugnant to the rest of the deed, and cannot avail in opposition to it; *Furnivall v. Coombes*, 5 Man. & G. 736 (E. C. L. R. vol. 44). As to the second point, there appears on the bill of exceptions clear evidence for a jury that the three directors who executed the contract were authorized by the shareholders, and, at any rate, that they had authority from Gooden, who is stated to have been a director at the time of the execution. The policy appears to have been in the form *37] always used by *the Company. [PARKE, B.—It is not stated that the usage was known to the several defendants.] If a body unite for the purpose of carrying on insurance, and a particular form of policy has always been used in their transactions, that is evidence against shareholders. [PARKE, B.—Not sufficient. The directors carry on all the business.] The importance of that fact depends upon the question how far a joint stock Company differs from an ordinary partnership as to the authority of members to bind it. In *Smith v. The Hull Glass Company*, 8 Com. B. 668, 675 (E. C. L. R. vol. 65), Wilde, C. J., delivering the judgment of the Court, says: "At common law, one of several partners in a trading concern may bind all by a contract made within the scope of matters relating to the partnership. If the partnership is of many, under whatever firm they trade, and whatever regulations they make inter se for managing and conducting the concern, each partner would still have the same power to bind his copartners. If, then, a copartnership consisting of a few active and many dormant partners had traded under the firm of *The Hull Glass Company*, the active partners might have bound the rest by contracts made, in the name of the firm, with reference to the copartnership business. Assume such to have been the constitution of *The Hull Glass Company*, the present case would have stood thus: Some of the partners, who were called directors, managed the concern, the other partners were dormant. The person employed to conduct the operative part of the concern, ordered certain goods, which were delivered on the premises of the copartners, and consumed there in their business. Is

not the accepting and using the goods, some evidence *that the party ordering had authority from the managing partners to [*38 give the order? It would, therefore, be the same as if given by themselves, and would bind the dormant partners. I am not aware that what is called a joint stock trading Company, if in fact a partnership exist between the shareholders, differs from an ordinary partnership in this respect." And he adds: (a) "It seems to us that the directors, unless restrained by the Act of parliament" (7 & 8 Vict. c. 110), "or the deed, would have all the authority given to partners by the rules of the common law. *Prima facie*, they would, as directors, have that authority." [PARKE, B.—Suppose an ordinary Company were notoriously carrying on its business by directors.] On that supposition all persons dealing with the Company would have notice that shareholders who were not directors had no power to bind. Wilde, C. J., in the passage first cited, is evidently contemplating the case of an ordinary Company, acting by directors. [PARKE, B.—Did it appear there, as in *Ridley v. Plymouth Grinding & Baking Company*, 2 Exch. 711,† that the defendants were a registered joint stock Company?] It did. The rule, from which the present case cannot be withdrawn, is that, in a partnership, a partner may bind for purposes within its scope, unless distinct notice be given that he is not authorized to do so. It would be promoting fraud to hold that, after policies have invariably been issued in a particular form, they may be disavowed by reason of some article in a deed of settlement, the contents of which were unknown to the assured. It is to be observed also here that the policy is recognised by adjustment after the loss. The question of authority is not one of *those appearing by the bill of exceptions to have been [*39 raised at the trial. If it had, the point might have been cleared up by evidence. [PARKE, B.—The question is raised as upon the construction of the policy.] On the contract itself the defendants appear to be liable: there is no distinction between them and the subscribing parties, unless it can be denied that those parties were their agents: but whether or not they were so is not a question of construction.

If the Court look from the policy itself to the deed of settlement, that confirms the position that the directors were authorized to execute a joint contract. (He then commented upon several passages of the deed.) An important observation is, that the Company is formed with a view of raising 1,000,000*l.* capital, and it is agreed in the indenture that, in every policy to be effected with the Company, the directors shall state that "the subscribed capital of 1,000,000*l.* sterling" and other the stocks, &c., shall be liable under the policy. The directors are authorized to pledge a fund of one million. Here a much smaller sum was actually subscribed. If the directors, by authority of the Company, pledge a million, and only half a million is subscribed, the

Company must be taken to engage for the other half, or else they sanction a fraud. Both on the deed and on the policy an intention appears to carry on business as a Company, limiting individual responsibility as far as may be possible consistently with that purpose: but, when they enter into contracts which in legal effect are joint, they cannot, by such a form of words as they have introduced into this policy, discard joint responsibility. To do so, they should have stipulated in the contract itself that individuals should not be sued.

*40] [MARTIN, B.—Are persons to be bound *though they expressly say they will not? May not one party declare that he will not be bound, and the other assent to that? And is not this virtually the state of things here?] The words of the policy are the Company's words, and must be taken most strongly against themselves. But, further if the deed prohibits the directors from binding the members of the Company, but the directors have entered into a contract in the course of the partnership business, which in fact does bind them, the Company are liable to a party who has dealt with them under such contract, not knowing of the restriction: *Hawken v. Bourne*, 8 M. & W. 703,† is an express authority on this point. *Ridley v. Plymouth Grinding and Baking Company* is distinguishable from the present case: there the defendants were a registered Company, and the persons dealing with them had, under stat. 7 & 8 Vict. c. 110, means of ascertaining the contents of their deed of settlement. [PARKE, B.—If there were an express authority to the three directors to make a contract in their own names, binding only themselves, and they chose to execute it as binding the Company, would the contract so operate?] It would: *Smith v. The Hull Glass Company*, 8 Com. B. 668 (E. C. L. R. vol. 65). [TALFOURD, J.—That case is still depending in the Common Pleas after a second trial.](a) The ordinary rule of partnership being that every partner may bind the firm in affairs of the partnership unless he is restricted and the party dealt with has notice of such restriction, the case of a joint stock Company differs from that of a common partnership only in this, that its being managed by directors may be a notice *41] *that shareholders who are not directors have no power to bind the Company: but it is no notice that the directors have no power or only a limited one; and, at any rate, the fact of a Company being so managed is not actual notice: it is only some evidence of notice. [ALDERSON, B.—If a party has notice that the Company is governed by directors, ought not he to inquire what their authority is?] He may be entitled to assume that (as was said in *Fox v. Clifton*, 6 Bing. 776, (E. C. L. R. vol. 19),)(b) each partner makes the others his agents for the purpose of entering into all contracts for him within the ordinary scope of the partnership business. [PARKE, B.—What is the “ordinary

(a) See *Smith v. The Hull Glass Company*, 11 Com. B. 897 (E. C. L. R. vol. 73).

(b) See p. 792.

scope" of a partnership business of insurance? ALDERSON, B.—Must not the actual authority be looked to? PARKE, B.—I take it as established that, in joint stock companies, individuals, as such, have no right to bind the partnership, but it rests with the directors. I much question, however, whether the powers of the directors were restricted in this case, and still more whether the point is raised by the bill of exceptions.(a)]

Peacock, in reply.—The question as to notice is decided by the terms of the policy itself, and the reference there to a fundamental principle, that the responsibility of shareholders shall not be pledged beyond a certain extent. Supposing that the contract may be a joint one as it regards the parties signing, it cannot be so on the part of the other shareholders: for parties cannot jointly contract to be liable in different amounts; the contract, if joint, would have made each individual liable for all, *and to the full amount insured. The directors, therefore, [*42 have exceeded any authority that could be vested in them, if they have assumed to make a joint contract for the shareholders. The deed of settlement prescribes that the directors shall cause it to be inserted in every policy that the Company's capital and unapplied stock shall alone be liable, and that no proprietor shall be answerable beyond the unpaid part of his share; but they were also to insert "that the directors signing such policy, or any of them, should not be responsible to the person to whom such policy might be issued to any greater extent than the funds or property in their hands or power at the time of recovering upon such policy should be competent to discharge." This clause is not introduced in the present policy. It is said that a fraud is committed by the Company if the directors, under their sanction, profess to pledge 1,000,000*l.* as the subscribed capital, when only 500,000*l.* is subscribed. But, supposing this were so, it does not follow that the proprietors are jointly liable in the terms of the policy; *Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66). The supposition of a joint liability is so directly opposed to the stipulation limiting each man's liability to the amount of his own unpaid capital, that, if there were a judgment against the Company for 2000*l.*, and two shareholders held to the amount of 1000*l.* each, and one had paid up the whole 1000*l.*, the other nothing, the first might be made answerable to the whole extent of the other's share. [PARKE, B.—He would be responsible for the directors applying the general fund properly, and would be surety for each co-proprietor to the extent of his own unpaid share.] According to the argument for *joint liability, a party suing the directors on such a policy as [*43 this might be met by a plea in abatement, showing that he ought to have sued five hundred shareholders. [PARKE, B.—The answer might be that the plaintiff had the option of suing the directors as the actual

(a) As to the consequence of such omission, *Butt* (with *Mellish*) referred to *Bain v. Whitehaven & Furness Junction Railway Company*, 3 Ho. Lords Ca. 1.

contracting parties, or their principals.] The objection that the directors had not authority appears sufficiently by the bill of exceptions. The demurrer does not raise it, because the Court cannot see, upon the record, that the defendants did not personally sign the policy; but then, the facts being proved on the trial, the defendants say that, upon the evidence, assuming it to be true, no action at all lies upon the policy; and, secondly, that, upon the same assumption, no action lies against the defendants jointly. *Cur. adv. vult.*

The learned Judges, not being agreed in opinion, now delivered judgment seriatim.

MARTIN, B.—This was an action on a policy of insurance on the ship *Vindicator*, dated 18th November, 1846, and signed by three directors of a marine insurance company, called “The General Maritime Assurance Company.” The defendant Hallett demurred to the declaration. This demurrer was argued in the Court of Queen’s Bench, and judgment given for the plaintiff. There were various pleas by the other defendants: but it is only necessary to refer to the plea of Non assumpsit, which was pleaded by the defendant Gooden. The cause was tried before Lord Campbell, at Guildhall, when a verdict was found for the plaintiff, and final judgment was afterwards signed against all the defendants. A bill of exceptions was tendered at the trial to *the *44] direction of the learned Judge; and the whole case has been brought before us by writ of error.

Two points have been made by the learned counsel for the plaintiffs in error: first, that the judgment of the Court of Queen’s Bench on the demurrer to the declaration was erroneous; and, secondly, that the direction of the Chief Justice at *Nisi Prius* was also erroneous.

The declaration stated that the defendants were proprietors and shareholders of and partners in The General Maritime Assurance Company; and that the plaintiff made a policy of insurance with the Company; and that it was declared and agreed by and between the Company and the assured that the capital stock and funds of the Company should alone be liable to answer and make good all claims and demands whatsoever under or by virtue of the said policy, and that no proprietor of the said Company, his or her heirs, executors, or administrators, should be in any way subject or liable to any claims or demands, nor be in anywise charged, by reason of the policy, beyond the amount of his or her share or shares in the capital stock of the Company, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietor should, in all cases and under all circumstances, be limited to their respective shares in the capital stock. The declaration proceeded to allege that, in consideration that the plaintiff, at the request of the defendants, had paid to the defendants a certain sum, &c., as a premium, &c., the defendants promised the plaintiff that they, the defendants, would become and be insurers to the

plaintiff of the said sum, &c., upon the said ship, &c., and would perform and fulfil all things in the said policy contained on their part, as such *insurers, to be performed and fulfilled; and the defendants [45 then became and were insurers to the plaintiff, and then duly subscribed the policy as such insurers of the said ship. The declaration then contained the usual averments of the plaintiff's interest and the loss of the ship, and proceeded to allege that, although the capital stock and funds of the said Company always, from the time of the making of the said policy hitherto, have been and are sufficient to pay the plaintiff the sum insured, of which the defendants had notice, and were, after the loss, requested to pay the amount insured, yet the defendants have not paid the sum insured, and the same is still unpaid.

The objection was, that there was no personal obligation upon the defendants to pay. I am, however, of opinion that there is no fatal objection upon the face of the declaration. It is there alleged that the defendants made the promise and subscribed the policy; both of which facts are admitted by the demurrer; and it seems to me that the declaration alleges and imports a direct personal promise by the defendants to pay the amount insured if the capital stock was sufficient for the purpose, and which it was averred in the declaration, and admitted by the demurrer, to have been. The breach is, that the defendants did not perform what, as it appears to me, they admit they promised should be done, viz., the application of the capital stock to the payment of the loss. The cases of *Andrews v. Ellison*, 6 B. Moore, 199 (E. C. L. R. vol. 17), and *Dawson v. Wrench*, 3 Exch. 359,† are directly in point; and I am not prepared to say they were not rightly decided. So, also, the cases of *Gurney v. Rawlins*, 2 M. & W. 87,† and *Reid v. Allan*, 4 Exch. 326,† are to the same effect: *and I think that the judgment of the Court of Queen's Bench on the demurrer to the de- [46 clamation ought not to be reversed.

The second question arises upon the bill of exceptions; and the point which has been argued before us is, whether there was any evidence to go to the jury against the defendant Gooden upon the issue on the plea of Non assumpsit.

The following was the evidence adduced by the plaintiff: The deed of settlement of the Company, dated 23d April, 1840, executed by all the defendants; (the parts material are set out in the bill of exceptions); That all the defendants severally and individually held shares in the capital stock of the Company; That the defendant Gooden was a director, and held 250 shares of 100*l.* each in the capital stock; That Brightman, Everard, and Chambers were three directors, and as such signed the policy; The policy itself, which is set out at length in the bill of exceptions; That a total loss was adjusted at 1100*l.*; That 7500 shares had been subscribed for, and were held originally by the defendants and others; That 5000 were so held at the time of the commence-

ment of this suit, the remainder having become forfeited in various ways; That calls had been made to the extent of 25*l.* per share, the last being a call of 10*l.*, made on 29th September, 1847, but that nothing was paid upon it, although certain directors and proprietors had advanced 10,500*l.* in anticipation of it; That, in October, 1847, the Company ceased to underwrite policies, but the directors continued to attend the office for some months, when it was given up. On behalf of the defendant Gooden it was proved that the Company had not, at *47] the time of the accruing of the causes of action, *or at any time after, any money, property, or available funds in their hands wherewith to satisfy the plaintiff's claim.

Upon this evidence the counsel for the defendant Gooden submitted that there was no evidence to go to the jury upon the issue on the plea of Non assumpsit. The Chief Justice ruled that there was: and thereupon the bill of exceptions was tendered. The points submitted to the Chief Justice, as stated in the bill of exceptions, were:

First, that no action at law would lie upon the policy. Secondly, that the defendants were not jointly liable upon it; but, if liable at law at all, were only liable severally to the extent of the shares held by them individually. Thirdly, that no action would lie against Gooden, as he had not signed the policy. Fourthly, that the promise laid in the first count had not been proved, as the promise therein alleged was to be and become an insurer; whereas the only promise was, to pay out of the capital stock and funds if they were sufficient.

In the argument of the learned counsel for the plaintiff in error it was contended: That the partnership created by the deed of settlement of 23d April, 1840, was a lawful partnership; that there was nothing illegal in the capital of the partnership being divided into shares, and the partners or shareholders agreeing that no one should be liable to be called on to pay more than the amount agreed to be subscribed by him; that the plaintiff below had agreed with the Company, by an express term contained in the policy, that the capital stock and funds of the Company should alone be liable to make good all claims under the policy, and that no proprietor should be in anywise subject or liable to *48] a *claim, made by reason of the policy, beyond the amount of his share or shares in the capital stock, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietors should, in all cases and under all circumstances, be limited to their respective shares in the said capital stock; that, except as against the individuals who signed the policy, the plaintiff below could not, in any event, maintain an action against more than one shareholder without a violation of the express condition that the liability of each shareholder should be restricted to the amount of his own share and that he should not be responsible for his co-shareholders. It was also contended that no action at law was maintainable on the

policy, except against the persons who actually signed it; that in this there was no repugnancy, for that a suit in equity was maintainable against all the shareholders of the Company, and that it was no valid objection to a contract, that, in the event of a breach of it, the proceedings to obtain redress were confined to the courts of equity.

The case of *Reid v. Allan* was cited to show what was the real nature of the legal liability, as alleged by the counsel for the plaintiffs in error, viz., a separate one, confined to the extent of the shares not paid up; and the cases of *Halket v. Merchant Traders' Insurance Company*, 13 Q. B. 960 (E. C. L. R. vol. 66), and *Hassell v. Merchant Traders' Association*, 4 Exch. 525,† were cited as authorities that the defendant was not liable at all at law.

On the other hand it was contended, on behalf of the defendant in error, that The Maritime Assurance Company was a mere trading partnership; that, in law, *there was no distinction as to liability between a joint stock partnership, as this is usually called, and an [*49 ordinary partnership; that throughout this policy the Company were universally described as the contracting party; and that in this action (there having been no plea in abatement) the plaintiff below was entitled by law to consider every shareholder as the Company, and as if the Company were named as defendants on the record. That the true rule as to partnership liability was that laid down in *Hawken v. Bourne*, 8 M. & W. 703,† viz., that the partner authorized to make a contract was in the nature of a general agent, and had, by law, authority to bind his copartners in contracts usually made in the partnership business, although in direct contradiction to the actual authority given by the copartners; and the case of *Smith v. The Hull Glass Company*, 8 Com. B. 668 (E. C. L. R. vol. 65), was cited to show that there was no distinction between joint stock Companies and other partnerships.

The question which arises here is one of great importance. There are very many Companies (life insurance Companies and others) carrying on business under deeds similar to that in the present instance; and provisions substantially the same as those contained in the present policy are, I believe, universally inserted with the view of restricting the liability of the shareholders. The circumstance that Gooden was himself a director will make no difference; for, assuming that the liability of a director who has not signed the policy is different from that of a mere shareholder, there are, in the present case, other defendants who were mere shareholders, and it is quite clear that, in order to fix the defendant *Gooden upon the plea of Non assumpsit, evidence must [*50 be given of the liability of all the defendants upon the promise alleged in the declaration. The question of the general liability of the shareholders, therefore, directly arises.

The first question is, Are the stipulations in the deed, as to each subscriber or partner being responsible only to the amount subscribed for

by him, lawful and valid as amongst themselves? I entertain no doubt that they are. Such stipulations have been long in general use; their object is to restrict, as far as possible, the liability of the partners to the same extent as that of shareholders in the various corporations which have for a long period been created by Acts of Parliament for the purpose of effecting great public works. The partners agree amongst each other that each shall subscribe for and be responsible to a certain amount only; and that, in the event of one being compelled to pay a demand, the others will indemnify him separately, and in proportion to the extent of their respective interests, and no farther; and it seems to me clear that, as amongst themselves, when one has paid up the whole amount subscribed for by him, he is no longer responsible to any further amount to his co-shareholders, their liability to each other being precisely the same as that of shareholders in the ordinary joint stock corporations created by Acts of Parliament, in which the subscribers are liable to the extent of their subscriptions only, and, when they have once paid up all their calls, the legal liability to contribute further is at an end.

The further question then arises, what is the liability of shareholders and partners in such companies to third parties upon contracts made by the directors in the ordinary course of business? And it seems *51] clearly established by the authorities, that, with respect to third persons who have no notice of the terms of the partnership, the shareholders and partners in joint stock Companies are liable to the same extent and in the same manner as the partners in ordinary partnerships: and that the law pays no regard to the stipulations contained in the partnership deed as to the restriction of liability, or to any particular provisions as to the mode of carrying on the business different from that ordinarily used in such concerns.

In the case of *Rex v. Dodd*, 9 East, 516, 527, Lord Ellenborough, in delivering the judgment of the Court, stated that the holding out in the prospectus of two proposed trading Companies, one for manufacturing paper, and the other for distilling spirits, that no subscriber would be responsible beyond the amount of the shares for which he subscribed, was a mischievous delusion; that, as amongst the subscribers themselves, they might stipulate with each other for such restricted liability; but that, as to the rest of the world, it was clear that each subscriber was liable to the whole amount of the debts contracted by the partnership. So, also, Lord Eldon, in *Carlen v. Drury*, 1 Ves. & B. 154, 157, stated that he held it to be clear law that each individual in a joint stock brewery company was answerable for the whole of the debts of the concern.

The case of *Hawken v. Bourne*, 8 M. & W. 703,† before mentioned, as relied on by the defendant in error, was as follows. The defendant was a shareholder in a Company who worked a mine in Cornwall. There

were directors of the Company, of whom the defendant was not one. *There was a stipulation amongst the directors and shareholders, [*52 that all supplies for the mine were to be paid for in cash, and that no debt was to be incurred. The order for the goods, for the price of which the action was brought, was given by the purser or agent of the directors, which was the customary course in such concerns. The plaintiff knew nothing of the defendant being a shareholder; but it was not proved that he had any notice of the agreement as to not dealing on credit. It was objected, on behalf of the defendant, that there was no authority in the purser to bind him in a contract upon credit; that there was no liability by reason of the defendant appearing to be a partner, as the plaintiff knew nothing of him; and that, as a contract upon his credit was absolutely forbidden by him to the directors, a purser or agent appointed by them could not have any authority to pledge his credit. My brother Maule, who tried the cause, was of opinion that, the mine being worked with the knowledge and for the benefit of the defendant, he was liable on a contract entered into for articles ordered in the usual way of conducting such concerns on behalf of the owners, unless the party ordering them was, in fact, not authorized by the defendant, and the party supplying had notice of that fact. This ruling was objected to in the Court above; but the Court was of opinion that it was right. My brother Parke delivered the judgment. He stated that there was evidence that the defendant was a complete partner with the directors in working the mines in the manner in which they were worked; and that one partner, by virtue of that relation, is constituted a general agent for the others as to all matters within the scope of the partnership dealings, and has *communicated to him, [*58 by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in the business in which they are engaged: that any restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one possesses as a general agent for the other is operative only between the parties themselves, and does not limit the authority as to third persons who acquire rights by its exercise, unless they know such restriction has been made; and that, as it was usual to buy the articles in question upon credit, and also to buy them through a purser appointed by the directors, the defendant was liable.

The judgment in the case of *Smith v. The Hull Glass Company*, 8 Com. B. 668 (E. C. L. R. vol. 65), (a) is to the same effect, and also that in this respect there is no distinction between the liability of partners in joint stock trading Companies and partners in ordinary partnerships.

The result of these authorities therefore is, that, when persons constitute a partnership, whether in the form of a joint stock Company or

(a) See *Same v. Same*, 11 Com. B. 897 (E. C. L. R. vol. 73).

otherwise, the individual or individuals who are authorized to make contracts for the partnership have authority to bind all the partners in the manner usual and customary in the same trade or business, and even to delegate to others the authority so to bind them, if it be usual so to do, notwithstanding an express agreement not so to deal; and it is, I apprehend, upon this principle that partners in a trading Company, in a business in which bills of exchange are usually issued, can bind their copartner, notwithstanding the issuing of bills is expressly prohibited by the partnership agreement.

*54] *In the present case, therefore, if the policy contained no notice of a restricted liability, proprietors, shareholders, or partners, by whatever name they may be called, would be liable upon it; for it was a contract made in the way of their business, and by the parties authorized to make such contracts for the Company. But the plaintiff had express notice, on the face of the policy, of the restriction; and he agreed that the capital stock and funds should alone be liable to him, and that no proprietor should be in anywise subject to his claim beyond the amount of his shares; which he would certainly render the defendants liable to if he was entitled to recover on the promise alleged in this declaration; for to hold that the defendants promised as alleged would render them all liable to any extent, and each for the other, which is directly contrary to the restrictive clauses.

It was argued that this view was repugnant to the contract contained in the policy, and that a contract cannot be at the same time made, and a provision inserted that no action shall be maintained in the event of its being broken; and the case of *Furnivall v. Coombes*, 5 Man. & G. 736 (E. C. L. R. vol. 44), is an authority to this effect.

This may be so: but I think that this principle does not apply to the present case. There are two sets of actions which, in my opinion, may be maintained upon a policy in the present form: first, upon the authority of *Andrews v. Ellison*, 6 B. Moore, 199 (E. C. L. R. vol. 17), and *Dawson v. Wrench*, 3 Exch. 359,† I think that the individuals who sign the policy personally contract that the capital stock or funds of the Company shall be applied to answer the claim on the policy; and, *55] *secondly, that each individual shareholder may be sued and recovered against to the extent of his unpaid subscription.

The contract is contained in the policy, which I have no doubt was in a great measure copied from the form of the policy used by the two corporate Companies, The Royal Exchange and The London Assurance, who were respectively authorized by Act of parliament to insure as Companies or partnerships on joint capital. The policy expressly declares that the capital stock and funds of the Company shall alone be liable to make good all claims under it; and the meaning of this seems to me to be, that the plaintiffs agreed and consented to look, not to the general property of all the shareholders, but to confine themselves, first, to a fund

expected to be accumulated from payment by the shareholders of a portion of the sums subscribed from time to time, and the premiums received in the course of business and kept by the directors for the purposes of the current demands upon the Company; and, secondly, as a sort of reserve fund, to the liability of each shareholder, to the extent of his shares not paid up. But the policy proceeds further, and expressly declares that no shareholder shall be liable to any claim, nor be in anywise charged, by reason of the policy, beyond the amount of his shares in the capital stock. Now it seems to me that there is here declared, first, that the shareholder shall be liable to the extent of his unpaid shares; and, secondly, that he shall not be liable further. And to hold the defendants liable in the present action might render them further liable, and would render them jointly liable, which is equally inconsistent with the above provision, which clearly contemplates a separate liability only. The plaintiff *was under no obligation to insure with the Company; but, as he thought proper to do so, he is, in my opinion, [*56 bound by the express declaration in the policy. I am unable to understand how a shareholder can, upon a contract, or, in other words, by his own agreement, be rendered liable to an unlimited extent, when he and the party with whom he has contracted have, as it appears to me, in the most plain and unambiguous terms, agreed that he shall be liable only to a limited extent. If this agreement be illegal, it is of course void and of no effect; but I see nothing illegal in it: and, if it be legal, the proper duty of a Court of law is to carry it out; and, even if it were incapable of being carried out, I do not think that such incapacity would empower a Court of law to impose upon the shareholders a liability or obligation which they and the parties with whom they contracted expressly agreed they should not bear. In my opinion, however, the contract is capable of being carried out; and, although the remedy is an inconvenient one, and may possibly lead to a multiplicity of actions, I see no objection, in point of law, to a separate action being maintained against a shareholder to recover from him upon the policy to the extent of his unpaid shares. Upon a common marine policy, each underwriter incurs a separate liability as to a limited amount. Upon the present policy, I think, also, each shareholder incurs a separate liability, and to an amount limited to his unpaid shares. It seems to me that each shareholder authorizes the pledging of his personal liability to this extent. This liability is referred to in the judgment of the Court in *Reid v. Allan*, 4 Exch. 826:† and, as I have already observed, I [*57 *see no objection to it in point of law, as it seems to me to be entirely consonant to the intention of the parties, expressed in their contract. In reality it is an agreement to perform a contract, with a proviso, that, in the event of a breach, the payment to be made in respect of it shall be made by each contractor separately, and be so

much, and no more. In my judgment, it is lawful for parties so to agree.

It may be observed, that, by the 36th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, execution may be issued against a shareholder to the extent of his shares not paid up, if a judgment against the Company cannot be made available against the property of the Company; which is a liability very like that which I consider to be the contract of the individual shareholder in the present case.

The cases of *Halket v. Merchant Traders' Company*, 13 Q. B. 960 (E. C. L. R. vol. 66), and *Hassell v. Merchant Traders' Association*, 4 Exch. 525,† were relied upon as authorities directly in point for the plaintiffs in error.

By stat. 7 & 8 Vict. c. 110, the Act for the regulation of joint stock Companies, provision is made, by the 66th section, for the enforcing judgments; and it is enacted that execution shall be enforceable, not only against the property and effects of the Company, but also, if found unavailing, against the person, property, and effects of the shareholders. A judgment had been obtained against the Merchant Traders' Company upon a policy which contained a restrictive proviso substantially the same as in the present case; and, no satisfaction being obtainable from *58] the Company, an application was made for leave to issue *execution against a shareholder. The rule was discharged. Lord Denman, C. J., stated, that the only sensible meaning of the words was, that the assured should look to the funds of the Company alone, so far as any remedy at law extended, and that the individual subscribers should be liable only to contribute to the funds of the Company to the amount of their respective shares; which liability must be enforced by the Company either at law or equity, as the case might be, and which liability might possibly be compelled, by the assured, by some proceeding against the Company. He further stated that the operation of the Act was, not to do away with any special contract entered into with the Company, but only to enable parties who had recovered on a general contract with the Company, not restrictive in its terms, to recover against the individual shareholders. From this judgment it appears that the Court of Queen's Bench considered that no action at all lay at the suit of the assured against the individual shareholders. As I have already stated, I do not concur in this view: but in the case in the Queen's Bench the policy was under seal; and the point was not much discussed at the bar.

The case of *Hassell v. Merchant Traders' Association*, in the Exchequer, is precisely to the same effect.

I am, therefore, of opinion that there was no evidence of any joint liability of the defendants to go to the jury, which was one of the points submitted to the learned Chief Justice, and stated in the bill of excep-

tions; and that the final judgment of the Queen's Bench ought to be reversed.

*TALFOURD, J.—The principal question in this case is, whether the policy of insurance, as set forth in the declaration, or as adduced in evidence, sustains a joint promise whereby the defendants below promised to become insurers to the plaintiff below of the sum insured, and to perform all things in the policy contained on their part, as such insurers of the said sum. If such promise *cannot* consist with the policy set forth, even if it were expressly made by all the members of the Company, under the circumstances alleged in the record, the defendants below are entitled to judgment on demurrer: if it *may* so consist, but is not substantiated by the policy and proofs adduced, the plaintiff below failed to establish the affirmative of the issue cast on him by the plea of Non assumpsit of Gooden, and the consequence must be a venire de novo: otherwise, the plaintiff below is entitled to retain his judgment. I think that the declaration, which expressly alleges a joint promise, which avers that the defendants subscribed the policy, and became assurers, and which *may* import that the defendants form the entire Company, may be sustained, for the reasons which will be expressed by my learned brother Parke, and which (as this is not the point that renders the delivery of separate judgments necessary) I need not anticipate: but I think the promise stated, and put in issue by the plea of Non assumpsit, is not supported by the proof.

The policy produced in evidence, headed "The General Maritime Assurance Company:" "capital, one million," was not subscribed by the defendants, but by three directors of the Company in which the defendants severally held shares.

The policy in its earlier passages purports to be *an assurance by the Company, in terms which, if unqualified, would undoubtedly imply a contract by all its members. But these terms are capable of qualification; and the question is, whether they receive it. Those words might have been followed by stipulations clearly showing that the capital stock alone was charged with the burthen of the claims of the assured, so as to exclude all personal responsibility at law of the shareholders; and still the general terms of apparent contract would retain their natural signification and force; for the shareholders, by subjecting their funds to the claims of the assured, would become, in the sense thus denoted, assurers.

Supposing this purpose to have been most distinctly expressed, it could not be contended that there were inconsistent intents indicated by the instrument, a general intent by the Company to make a joint contract, and a particular intent to avoid it, and that the general intent ought to prevail, as when inconsistent intents are apparent in a devise; but the language which might mean one thing would be shown to mean

another thing, and a single intent would be adduced, though from apparently inconsistent language.

The clause which explains the sense in which the Company became insurers is as follows: "And it is declared and agreed by and between the said Company and the assured that the capital stock and funds of the said Company shall alone *be liable*," &c. (His Lordship read the clause, as at pp. 24, 25, ante, to "capital stock.")

In the construction of this clause a question arises preliminary to that immediately in judgment: What is the meaning of the words "capital stock?" Do they imply the capital of "one million," in which *61] the public are invited to confide, whether paid up or not; or only the funds which may be actually in hand when the loss occurs? On this point the learned Judges who decided the demurrer, and Lord Campbell, C. J., seem to differ; the former partly basing their judgment on the position that "the fund intended" must be not the nominal unpaid capital, but an available sum in hand from whatever source derived, and not expended for other purposes;" (a) and Lord Campbell ruling, on an issue in this case traversing the alleged sufficiency of the capital stock to pay the plaintiff, that the terms mean the entire capital which the shareholders have undertaken to subscribe. I think the ruling of Lord Campbell on this point correct, subject to the limitation which I also think the subsequent words introduce.

The policy, having thus denoted to the insured that the fund provided for his indemnity consists only of the entire capital, proceeds further to provide that, inasmuch as the aggregate capital consists of subscriptions from many persons, it is intended to prevent the possibility of those who may contribute their full proportions becoming liable for the failure of others; and therefore in the largest and fullest language limits, or seeks to limit, the responsibility of each individual proprietor to the amount of his shares. How can this purpose be effected but by construing the language as creating at most an individual liability in each proprietor to the extent of his shares? And this can only be effected by regarding the contract, if any except by the subscribing directors, as a contract by each. If the contract is jointly made by *62] all to pay the sum assured by each policy, subject only to the condition that the capital, paid up and unpaid together, shall be sufficient to meet the demands of the assured, it is obvious that any proprietor who may be selected for attack, although he has paid up his full contribution to the stock, may be charged, by executions against his goods or his person, to a ruinous extent; that is to incur the precise mischief against which the language would seem to exempt him. It may be said that great inconvenience would follow from holding each proprietor severally liable to the assured to the amount of his unpaid shares; and this, no doubt, is so; but the probability is, that the parties

(a) See the judgment of Mr. Justice Coleridge, in 19 Law J. (N. S.) Q. B. 40.

who have effected insurances on similar policies, thus inartificially framed, have looked to the fund subscribed for, and to its just administration by the directors, and have not contemplated a resort to the individual responsibility of a number of unnamed, and probably unknown, shareholders; unless, indeed, they have regarded (as they may do, on the authority of the Court of Exchequer in *Dawson v. Wrench*, 3 Exch. 359,†, the signing directors as contracting for the truth of the representation of the policy, and for the due collection and administration of the funds of the Company.

Unless the words of the proviso have the meaning it seems to me they bear, I cannot attribute to them any; for, if they import only an internal regulation of the Company, they are foreign to the relations between the Company and the assured; and, if they bear this meaning, I think they are irreconcilable with the joint promise alleged to have been made by the plaintiffs in error.

*For these reasons I think the issue on the plea of Non Assumpsit is unsupported by the evidence, and that there must be a venire de novo. [*63]

WILLIAMS, J.—I am of opinion that the direction of the Judge to the jury on the trial of this cause was unexceptionable, and that the judgment ought to be affirmed.

Although I have the misfortune to differ from the majority of my learned brethren in this respect, yet we all agree, I believe, in thinking that no objection can be made in support of the writ of error on the ground that the Company (of which the defendants below were proved to be members) did not authorize the making of the policy on which the action is founded. No such point is properly raised on the bill of exceptions. It must, therefore, be taken that it was duly proved at the trial that the defendants below, together with the other members of The General Maritime Assurance Company, entered into such a contract with the plaintiff as is constituted by the terms of the policy.

It was, however, contended, on behalf of the defendants below, that those terms do not amount to a joint contract by them and all the other members of the Company, but to a several one with each of them; and consequently that the declaration, being founded on a supposed joint contract, was not sustained by the evidence; and that the Judge ought accordingly to have directed the jury to find for the defendant on the issue joined on the plea of Non Assumpsit. But I am of opinion that the terms of the policy constitute a joint contract by all the members of the Company, and that, therefore, this exception fails.

*With respect to the form of the policy, the Company, in the ordinary way and in the ordinary form, become the assurers of the ship on the specified terms, and promise to perform those terms, and acknowledge the receipt of the premium as the consideration of [*64]

their promise; and, but for the introduction of the special clauses hereafter to be considered, this would be the plainest possible case of a commercial association of assurers entering into a contract of assurance for the joint benefit of all the partners, in the ordinary course of their partnership business.

But it is specially stipulated that the capital stock (which in the heading of the policy is stated to be one million) shall alone be liable to answer any claim under the policy; and it has been held in several decided cases (and seems to be undisputed) that, by reason of this stipulation, it is a good plea in bar of any such claim, that the Company have no assets to meet it, inasmuch as they have spent the whole of that capital stock.

There is, however, a further special stipulation, which is said to demonstrate that the contract is not joint by all, but several by each of the members who authorized the policy to be made; viz., it is carefully stipulated that no proprietor shall be in anywise charged by reason of the policy beyond his share in the capital stock; and it is mentioned as one of the principles on which the Company is founded, that the responsibility of the individual proprietors shall, in all cases and under all circumstances, be limited to their shares in the capital stock. It is argued, in support of the writ of error, that this shows that each member contracts, not jointly, but severally, to bear the loss in proportion *65] to his share or *shares. It may be observed, however (as was pointed out by Lord Denman, C. J., in giving the judgment of the Court in *Halket v. Merchant Traders' Company*, 18 Q. B. 962, 3 (E. C. L. R. vol. 66),) that there is no provision that, when a shareholder has paid up the full amount to the Company, he shall not be liable, in proportion to his share, to the assured. His responsibility, it is conceded, is to exist, but is to be limited to the amount of his share; and it seems to follow that he could not be allowed to plead that he is not responsible to that amount because he has paid up the whole of his shares (that payment having been made, perhaps, since the plaintiff's policy was effected, and the money appropriated to claims on the Company which have arisen later than the plaintiff's claim). Suppose, then, an action brought against a single shareholder on the supposed several contract (contained in a policy such as the present), where there has been an indisputable loss recoverable under the policy. Practically speaking, if the Company were solvent, no defence would be made, and the loss would be paid. But suppose the Company to be insolvent and the capital stock to have been all spent: must the defendant, at his peril, ascertain the amount of the loss, and whether it exceeds the amount of the shares he holds; and, if it does not, confess the action; and, if it does, plead payment of money into Court to the amount of his shares, and, as to the residue, that he is only a shareholder to the amount he has paid into Court?

This seems to be the only course of pleading open, unless, indeed, he had paid up all his shares, and it were competent to him (notwithstanding the difficulties *which I have above suggested) to plead that fact as in itself a bar to the action. But in neither case [*66 would there be any room for the plea in bar which, by the supposition, is afforded by the earlier special clause, viz., that the capital stock of the Company has been exhausted; for that would be altogether immaterial if the defendant's liability is to extend and to be confined to the amount of his own share. The only answer to this difficulty is the proposition contended for by Mr. *Peacock*, viz., that the signature of the policy by the directors enures to make it a joint contract, on their part, to pay all just claims on the policy, provided the capital stock be sufficient; and that the rest of the Company, who have authorized the making of the policy on their behalf but have not signed it, contract severally, and not jointly, and contract only to pay in proportion to their own shares.

I am, however, of opinion that the signature of the directors has no such operation. It purports merely to testify the contract, and that the Company are content with the assurance. And there is nothing in the language, or the nature, of the instrument which indicates that those who subscribe it intend, by reason or by force of their signature, to increase their liability beyond that of the other contracting parties, or to do anything more than to authenticate the instrument as a policy under which the Company have become the assurers.

It is not required by law that such a contract should be signed by those who are to be charged by it. I feel it, therefore, difficult to understand how the signature, not being necessary for the validity of the contract, nor in any way of the essence of it, can be capable of varying its meaning or effect; or how either the members who, being directors, signed it, or the other members of the *Company, by whose actual authority such a contract was made, purporting to [*67 be made on their behalf, can be at all in a different condition from that in which they would have been if the instrument had not been signed at all, or had been signed by all the members individually, instead of being signed by some of them on the behalf and by the authority of the rest.

I therefore think that the plaintiffs in error cannot sustain the proposition that the liability of the directors who signed the policy is different from that of the other members of the Company who authorized the signature. And, if their liability be identical, another argument arises against the validity of the plea in an action against a single member, that he has paid up all his shares. For, if this were a good plea, and all the shares were paid up, it is obvious that each member would have a good answer to an action against him; and therefore, unless a joint action could be maintained against all, no action whatever would

lie on the policy, notwithstanding the capital stock of the Company were fully sufficient to answer the claims.

Perhaps the proper explanation of the matter is, that this form of policy was introduced in earlier times, when the system of allowing the shareholders to keep back part of the money due on their shares was unknown; and therefore the policy assumes that there is a capital stock of a million, in the sense that every member has actually brought the whole amount of his share into the partnership stock: and it is accordingly stipulated that recourse shall only be had to this fund for satisfaction of all claims under the policy. If, therefore, all the capital stock should happen to be spent, this will be an answer to any such *68] claim in any action, whether brought against *all or any of the members: and thus the individual members, having already contributed the whole amount of their shares, cannot be compelled to pay more, or be made further responsible, as they might have been but for these special clauses. If this be so, the whole difficulty arises from the members choosing to sanction the modern practice of allowing part of the capital stock to remain in the shape of money unpaid upon the shares, and thus introducing the question of one member being responsible for another paying up his shares; which could not possibly arise if the theory of such partnerships were carried into due effect, and the capital really existed in the shape of contributed capital stock.

Unless the policy will admit of this construction, I think that the latter special clause must be neglected in construction, as being repugnant to the general effect of the contract, which, in my opinion, is a joint contract of assurance by several assurers. If such a contract contains stipulations restraining the necessary legal consequences of it, they must be rejected as impracticable in law, in like manner as was done in the case of *Furnivall v. Coombes*, 5 Man. & G. 736 (E. C. L. R. vol. 44), where the defendants had entered into a personal covenant, and then endeavoured, by the introduction of a proviso, to relieve themselves from all personal liability.

It was also contended, on behalf of the plaintiffs in error, that the Court of Queen's Bench had erroneously given judgment on the demurrer for the plaintiff below. But I am of opinion that the judgment of that Court was right. On this question, however, as I do not differ, I *69] believe, from any other member of the Court, I do not *deem it necessary to explain the grounds of my own opinion.

On these grounds I think the judgment of the Court below ought, in all respects, to be affirmed.

PLATT, B.—The declaration in this case is upon a policy of insurance, which policy of insurance contains this clause: It is "agreed by and between the said Company and the assured that the capital stock and funds of the said Company shall alone be liable," &c. (His Lordship read the clause set out, ante, pp. 24, 5, to "shares in the capital stock.")

The declaration, having set forth a policy of that description, goes on to charge a general promise on the part of the five defendants, who were shareholders in this Company, only, and the breach assigned is as upon a joint and personal assumption of responsibility by them. To this declaration one of the defendants demurred.

With regard to that demurrer it is sufficient to say that the judgment of the Court may be founded upon other parts of the objections to this record without deciding upon the validity of that demurrer. Upon the question raised by that I have considerable doubt; but another of the defendants has pleaded, amongst other pleas, Non assumpsit, raising therefore the question of the promise as stated upon the record, namely, whether he made such a promise or not, or whether there was a joint promise (I should rather say) made by the five defendants in the manner in which it is stated upon the record.

At the trial it was objected that there was no evidence to support that promise, it appearing by the production of the deed of settlement, by the reading of *the policy of insurance, and the signing of the [70 directors, that the premises were not, as was contended on the part of the defendant, sufficient from which to draw the conclusion of liability. The manner in which the points are taken is this: that, upon the several matters as produced in evidence, the Chief Justice ought to have directed the jury to find a verdict for James Gooden on the issue first joined; first, because no action at law would lie upon the said policy; secondly, that the defendants were not jointly liable upon the said policy if liable at all, but severally only; thirdly, that no action would lie upon the said policy against Gooden, inasmuch as he had not signed the policy; fourthly, that the promise alleged in the first count of the declaration is not proved, inasmuch as the promise alleged was a general promise by the defendants to become and be assurers. Those are the points raised. Now it was contended in the course of the argument that this was, in fact, an attempt on the part of partners to do that which the law would not permit; and it seems to me, I own, that that proposition was founded on a fallacy; because there is no magic in a number of persons becoming partners, which will prevent them from acting independently with persons with whom they contract; and the general responsibility, beyond all question, may be modified and varied. If partners jointly contract without in any manner restricting or qualifying their responsibility, there is no doubt they are jointly, personally, and generally responsible. So, an agreement among themselves, unknown to the party with whom they contract, would not vary that general liability: but, if the party with whom they contract should, by the terms of the bargain, agree that their responsibility should vary from [*71 *the ordinary responsibility, he may be bound and he would be bound by that variation. What objection could be raised to a contract by which four parties agreed to buy of a merchant merchandise upon

the terms of one of them paying half the price and the three others paying each a third of the remainder, and by which it was distinctly stipulated between the buyer and the seller that the seller should not be entitled to demand except in the several proportions, and severally against the different partners? Is that an illegal contract? Is the law to make a contract which the parties never contemplated? That is the bargain which they have made; and that is the bargain by which all ought to be bound. It is no answer to say that they contracted as partners, and that by the general law partners are jointly liable. In the case supposed they would not have contracted on that footing. There is a fallacy in the argument that the parties do not contract here upon that footing, they being partners, and, in the case supposed, have contracted but not generally. The terms of the contract would regulate the application of the law provided it did not infringe it by illegality. By these terms the parties assumed, and the seller was content to accept, a qualified and defined responsibility; and what could the seller exact more?

Now upon the evidence it appears that the policy was made according to the deed of settlement; and, according to the deed of settlement, no power whatever was given to the directors to bind the shareholders jointly and personally. The contract, therefore, which is produced in evidence, and which binds Gooden by reason of the signatures of the directors (and that is the only link by which he is connected with the *72] contract *entered into with the assured), is made in pursuance of the power contained in the deed of settlement. Does that power extend to contracts in the general manner in which it is stated in the record where the allegation of the promise is made? Most certainly not. It is no evidence of a contract made by them, unless pursuant to the deed of settlement; no evidence whatever of another contract as alleged upon the record: and for that reason I think that, upon the bill of exceptions tendered to the ruling of my Lord Campbell at the trial, upon the objections taken, and which appear upon that bill of exceptions, the defendants, that is the defendant Gooden, ought to have had the verdict upon that plea.

With regard to the question whether separate actions may be brought upon this contract against the several shareholders: possibly the contract may be of that description as to enable the parties to sue the persons who sign as directors, or to sue any one of the several parties who would be liable, to the extent of their unpaid contributions to the capital. It is clear that a separate liability of that kind has been sanctioned by the decisions of the courts of justice, because in the Court of Exchequer, and also in the Court of Queen's Bench, the cases that have been cited of *Halket v. Merchant Traders' Company*, 13 Q. B. 960 (E. C. L. R. vol. 66), and *Hassell v. The Merchant Traders' Association*, 4 Exch. 525,† show that that several liability, and the limitation of the respon-

sibility in respect of the several liability, have been sanctioned by the Courts. However, I do not desire to be bound by any opinion I should form upon this part of the case: still I think there is considerable difficulty in making a contract with two aspects, *and great difficulty [*73 as it strikes me, in that respect, as regards this particular contract. Therefore, with respect to that, I beg to be understood as not expressing any opinion; but, inasmuch as the evidence upon the trial, in my judgment, did not support the case upon the plea of Non assumpsit, on that ground I think that the judgment of the Court of Queen's Bench ought to be reversed.

CRESSWELL, J.—This was an action against five persons on a policy of assurance. The declaration alleged that the defendants were proprietors and shareholders of and partners in a certain Company called "The General Maritime Assurance Company," and that the plaintiff effected a policy with the Company on ship for twelve months. The policy was then set out; and the declaration proceeded to aver that, in consideration that the plaintiff, at the request of the defendants, paid a certain sum as premium for the insurance of 1100*l.*, and undertook to perform all things in the policy on the part of the assured to be performed, the defendants undertook that they would become insurers of the said sum, and to perform all things in the policy on their part, as insurers, to be performed, and then became insurers, and subscribed the policy. The declaration then averred a loss; that the capital stock of the Company was sufficient to pay, but that the defendants had not paid, &c.

On demurrer by one of the defendants, the Court of Queen's Bench decided that the declaration was good. They must, therefore, have held that it disclosed a joint contract enforceable at law. Now, the contract was no otherwise shown than by the averment that the *defendants were shareholders of and partners in The General [*74 Maritime Insurance Company; a recital of the policy, as made between the assured and the Company; and an averment that the defendants promised that they would become and be insurers to the plaintiff of the sum insured, and would perform all things in the policy contained on their part, as such insurers of the said sum, to be performed, and that the defendants then duly subscribed the policy, which would make no difference, for they might very well contract to become insurers without subscribing it; and, if, in the absence of their subscription, it would have been a several and not a joint contract, the subscription would not alter it. The promise is laid merely as a promise to perform what the policy contained on their part to be performed; and, if the policy did not contain anything to be performed by them jointly, the promise would not enure as a joint promise. The natural meaning of the words is, that they promised according to the contract contained in the policy. If the contract was joint, the pro-

mise would be joint; if several, the promise would be construed as several. I apprehend, therefore, that the Court of Queen's Bench must have been of opinion that the contract as set out, independently of the promise, was joint; and the language which they are reported to have used is not consistent with any other view of the case. I am of opinion that their judgment was right, and that the declaration shows a joint contract by those who entered into the obligations which it contains, whatever those obligations may be; and that such contract may be enforced by action at law.

Some of the defendants pleaded Non assumpsit, and various other *75] pleas, raising issues, which were tried *before Lord Campbell, C. J., in London; when a bill of exceptions was tendered to his Lordship's direction to the jury on several points, of which it is necessary to observe upon two only.

The first question so raised was on the plea of Non Assumpsit, viz., whether all the defendants became insurers by the policy, or, in other words, whether the contract of insurance was made in a manner and by persons competent to act for and bind the defendants, being members of and shareholders in the Company. In order to prove the affirmative, the plaintiff put in evidence the deed of settlement, whereby the defendants and others formed themselves into a Company or partnership, by and under the name of "The General Maritime Assurance Company," for the purpose of carrying on the business of underwriters of maritime risks.

The policy also was put in evidence. It was issued by the Company, in the form always used by them; and no question was made as to the propriety of issuing policies in that form: and it was signed by three members or shareholders, who were also directors. If the case is looked at as one of an ordinary copartnership, the contract of insurance, having been made by three members of the firm, in the name of the firm, and in the course of the business carried on by the firm, is binding upon all the members. If it is considered in a different point of view because the copartnership appears to be a joint stock Company, and it is considered necessary to show that the directors had authority by the deed of settlement to make such contract, I think it appears that they had. It was not objected that the policy was not in conformity with the deed *76] of settlement; the directors, therefore, in issuing it, acted *within the limits of the authority conferred upon them; and their contract was the contract of all the copartners, just as much as if each member had signed it. On Non Assumpsit, therefore, it must be held that the defendants entered into the contract alleged in the policy. But on Non Assumpsit it is also said that the declaration is on a joint contract, and that the policy showed a several contract only, and that there was no evidence of a joint contract. Neither the directors nor any other member of the copartnership had authority to act for the other

members, except in their capacity of copartners. They could make no contracts for them as individuals; and therefore the contract in question must either bind them jointly or not at all. The policy was correctly set out in the declaration; and it has been held on demurrer that the declaration discloses a joint contract, which, as I have already stated, I apprehend is to be collected from the policy as set out, independently of the promise alleged to have been made by the defendants.

Let us look at the terms in which the policy is made. It is headed: "The General Maritime Insurance Company:" "Capital, one million;" importing that it is a policy of the Company. Then, in describing the risks against which the insurance was made, it says, "touching the adventures and perils which the said Company are contented to bear, and do take upon themselves," not "which the members of the Company are contented," &c., "and do take upon themselves respectively." Again: as to the expense of suing, labouring, &c., by the assured, it says: "to the charges whereof the said Company will contribute according to the rate and quantity of the sum herein assured. And it is declared and agreed, by and between the said Company and the assured," &c. *Again: "And further, it is agreed by the said Company [*77 that this writing or policy of assurance shall be of as much force," &c. "And so the said Company are contented and do" "bind themselves and their successors to the assured" "for the true performance of the premises, confessing themselves paid the consideration due into the said Company for this assurance." Read "copartnership" for "Company," and it would seem impossible to contend that the engagements entered into are not joint.

I now proceed to consider what the contract entered into is. Undoubtedly it is a contract of insurance. The policy begins by stating that Bushby & Co. cause themselves to be assured, and the Company bind themselves for the performance of the premises in the policy (whatever they may be), confessing themselves paid the premium for that assurance. They undertake to insure; and we must look to the earlier part of the policy to see against what they insure: and there the risks usually inserted in such policies are found. Now, by insuring against certain risks, they undertake to indemnify against them. But now we come to the provision, that the capital stock and funds of the Company shall alone be liable to make good demands; which has been construed as a proviso upon the general contract to indemnify, which must, therefore, be read, that the Company undertake to indemnify against the risks enumerated, provided the capital stock and funds are sufficient for that purpose; *Gurney v. Rawlins*, 2 M. & W. 87,† *Dawson v. Wrench*, 3 Exch. 359.† This latter action was brought against the parties who signed the policy, but they signed on behalf of the Company generally; and, if they had authority to do *so, were no more bound than any other members of it. They did not under- [*78

take otherwise, or with any more extensive liabilities, than as members of the copartnership.

We now come to the consideration of the clause in the policy, that no proprietor of the Company shall be in anywise subject or liable to any claims or demands, nor in any way be charged by reason of *this policy* beyond the amount of his or her share or shares in the capital stock of the said Company, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietors shall, in all cases and under all circumstances, be limited to their respective shares in the said capital stock. It is not very easy to determine the meaning of this proviso. In considering it, perhaps we should assume that the Company are in possession of the whole of the capital which they profess to have; that is, a capital equal to the whole amount of the shares held by the different members, or, in other words, that the whole has been paid up. If that were so, inasmuch as by the condition in the policy the assured are only to be paid if the stock suffices, if they establish a right to be paid, there must be a fund adequate to make the payment, and any individual proprietor affected by a judgment would have a fund to resort to for indemnity; and the deed of settlement provides for indemnifying the individual proprietor in such cases. If this proviso is construed to mean that the individuals shall have such indemnity, there is nothing in it repugnant to the primary contract contained in the policy. If it is construed so as to compel the assured to sue each separately for his share of the loss, it is repugnant to the original *joint contract* to pay if the funds of the Company *suffice. Again: there is no stipulation that each shall pay
 *79] only a part of the loss in proportion to his share in the joint stock of the Company, but that he shall not *by this policy* be made liable to more than the amount of his shares. Construing that strictly, any one shareholder might, upon every policy issued by the Company, be compelled to pay a portion of the loss equal to the whole amount of his shares; a situation not much preferable to that form which these defendants seek to escape. I am, therefore, much disposed to think that the clause in question is incapable of receiving any intelligible meaning; and, if insensible or uncertain, it must be inoperative. If it receives any construction other than that which I first suggested, it is repugnant to the contract of insurance entered into by the policy, and therefore void; *Furnivall v. Coombes*, 5 Man. & G. 736 (E. C. L. R. vol. 44).

If the construction contended for by the defendants is correct, that the policy contains a separate contract by each proprietor only, and that the having paid up the amount of his shares furnishes a good plea in bar to the action, which is a necessary consequence of that construction, it follows that, if all the shareholders have paid up the full amount of their shares, and the whole capital is in the hands of the Company, no action at law can be maintained on the policies issued by them; not

against all the members, for the policy contains no joint contract, not against individual members, for each is supposed to have paid up the whole of his share of the capital.

This shows that, even if the contract to pay if the capital stock suffices be several, the proviso is repugnant to it.

I am, therefore, of opinion that Lord Campbell was *right in telling the jury that, upon the evidence, they might find a verdict [*80 for the plaintiff on the issue of Non Assumpsit.

On the other point argued before us, viz., whether there was evidence that the capital stock and funds of the Company were sufficient to pay the plaintiff, I think that the direction was right, for that the Company must be taken to have available funds so long as a large portion of the capital stock remained uncalled for.

I think, therefore, that the judgment of the Court below should be affirmed.

ALDERSON, B.—It is not my intention to give any reasons for my opinion on the various questions arising out of this writ of error on which we all agree that the judgment of the Queen's Bench is right. Those reasons will be found in the judgments of my learned brethren, and are not necessary to be repeated by me. I shall, therefore, confine myself to that question on which alone I differ from the judgment of the Court of Queen's Bench, and from the opinions delivered by my two learned brethren, Cresswell and Williams, to-day.

That point is, whether, looking at this policy, and giving effect to its various provisions, it can properly be said to contain any joint contract between the assured and all the proprietors of shares in the Company. This question arises on Non Assumpsit, in the case of Gooden. He has never signed any policy, nor personally made any contract; nor are we bound by the admission that the defendants did jointly contract, as we are in deciding on the demurrer of the other defendants.

The policy is certainly not very accurately framed so as to carry into effect what I cannot but call the very *clear intention of the proprietors, as collected from the deed, which alone gave the directors [*81 any authority to bind them.

The main intent appears beyond all doubt or dispute in this clause of the policy, by which it is stated that no proprietor of the Company shall be in anywise subject or liable to any claims, nor in anywise charged, by reason of the policy, beyond the amount of his shares in the capital. And then follow these emphatic words: "it being one of the original and fundamental principles of the said Company that the responsibility of the individual proprietors shall in all cases and under all circumstances be limited to their respective shares in the said capital stock." Now, if words can clearly express an intention, those words do so. If, therefore, we can in any way construe this policy so as not to fix each of the several proprietors with a joint liability to the full

extent of the claim in all cases of policies thus framed, we shall only be effecting the plain intention of those who framed and those who were parties to this contract.

Let us then see whether the words of the policy prevent us from doing this, when all its provisions are taken together and carefully weighed and examined. And, if this be done, I think we may either construe the word "Company" in this policy as synonymous with the funds of the Company, and the policy as showing that the directors who sign contract for the rest of the body of proprietors, but so far only that the funds of the Company shall indemnify the plaintiffs and be alone liable in the hands of the body of directors for the claim: Or, if this be not so, and if we must construe this word "Company" to *82] mean individuals for whom the three directors contract, then the meaning may be, that the individual members of the Company are to be taken as signing each for himself, through his agents, the three directors, for the amount of his shares remaining unpaid, like a body of separate underwriters contracting each through the same broker to insure a ship; and thus we shall make them separately liable to that extent, and so give effect to the declared intention limiting their liability. In either way of construing it, the issue, that Gooden and the other individual members of the Company made a joint contract with the plaintiffs, must be found for the defendant Gooden. In coming to this conclusion, I am satisfied we carry into full effect the provisions of the deed set out on this record. For, in truth, by the deed, I am satisfied that the three directors signing were really intended to be liable by reason of their signatures, and that the individual shareholders were not to be liable at all.

If we look carefully at its provisions, under which the directors are empowered to bind the defendant Gooden, we shall find that it directs all policies to be signed by three directors, and in a given form. It provides that every policy shall state that the subscribed capital and funds of the Company, remaining undisposed of at the time of any claim, shall alone be liable to make it good, adding, affirmatively, that the directors signing such policy shall be responsible to the extent of the funds *in their hands or power*, and, negatively, that no proprietor (obviously there meaning no other proprietor except the directors so signing) shall be liable beyond the amount of his unpaid share. This is the power given. It has been imperfectly complied with in this policy, which states the first and last conditions alone, omitting, *83] however, that intermediate part of the clause, as to the limited liability of the directors, which, however, appears to me to be of great importance, for it shows, I think, clearly enough, that the policy was only to be made binding on the shareholders provided that the mode in which the proprietors were intended to be made individually liable to the extent of their unpaid shares was properly stated, and that this

was to be through the power of the directors to make calls and so to get into their hands the amount of these unpaid shares, and that the directors signing were themselves to be personally liable to the assured to the extent of all the Company's funds either in their hands or in their power; that is to say, of all the funds they held, or, by making calls, could obtain.

It may, therefore, perhaps, be a question whether this policy was binding on Gooden, inasmuch as it was not made according to the power given by the deed. For Gooden really gave no authority to the directors to make any policy which did not state three things; first, that the funds alone were to be liable; secondly, that the directors signing were to be liable to the extent of the funds in their hands or power; thirdly, that the proprietors were only to be liable to the extent of their unpaid shares; the second clause, if it had been inserted, clearly showing to the assured, as I think, when coupled with the other two, that the individual proprietors could only be made liable through the directors, and were not to be at all individually responsible to them under the contract made.

This view of the case would, as it seems to me, give full effect to the deed; and it confirms me in coming to *the conclusion at which* [*84 I have arrived, and convinces me that I decide this case according to the real meaning and intentions of the parties.

I think, therefore, that the issue on the plaintiffs should have been found for the defendant Gooden, and that the judgment of the Queen's Bench is on this point erroneous. The result is that a venire de novo must be awarded on the issues. In all the other parts of the case, which, indeed, are the only parts which actually came before the full Court in banc, I agree in the correctness of their decision.

PARKER, B.—In this case some important questions arise, partly on demurrer, partly on a bill of exceptions to the ruling of Lord Campbell on the trial of the issues. The pleadings were as follows. (His Lordship then stated them.) On the special demurrer by Hallett, the defendant below, to the first count, and on the special demurrers to the first plea of the defendant Sir James Clark, and the third plea of the defendant Allan, and on the only plea of the defendant Hatfield, the question was, whether the first count was bad, either in substance or form, the pleas demurred to being abandoned by the learned counsel for the plaintiffs in error.

The Court of Queen's Bench held the first count to be good; and I think they were right in so holding. The formal objections, the principal of which was the uncertainty whether the defendants became insurers *generally*, and with all the obligations of ordinary insurers, or only insurers *upon the terms of the policy*, I think untenable; for the context clearly shows that the declaration meant to charge them only

*85] as insurers by *that policy, with the obligations only which were created by it. The other objection, as to the uncertainty of the time of the promise, is equally unfounded.

The objection of substance was, that there was no contract at all made by the policy on the part of any one, but only a charge of the joint stock fund, and available in equity only; and that, if there was a contract, it was not a *joint* one by all the defendants, but a separate one by each, whereby each agreed to be responsible only to the amount of his share in the capital stock, and not for the whole loss if it exceeded it, nor that one should be liable for the non-payment of another's share.

I think the Court of Queen's Bench rightly held that the declaration is good on the general as well as special demurrer.

In the declaration it is averred that the plaintiff paid them a premium, and promised to fulfil and perform everything in the policy contained on the part of the assured to be performed and fulfilled; the defendants promised that they would become and be insurers to the plaintiff for the sum specified, and perform and fulfil all things on their part, as such insurers, to be performed and fulfilled; and there is an averment of the sufficiency of the capital stock of the Company. In considering, therefore, the sufficiency of the declaration on demurrer, we are to assume that a joint contract by all the defendants is *admitted*, and on that assumption to construe the terms of the policy. So doing, I think it amounts to a joint contract that the Company shall pay out of their capital stock; in other words, if their capital stock and funds should be *86] sufficient. In *Dawson v. Wrench*, 3 Exch. 359,† the Court of Exchequer, on demurrer, held, in an action on a policy by the same Company, in which the declaration was against the subscribing directors, that this clause had that meaning; and the general course has been, in actions on fire policies, in which there is usually a similar clause, charging the fund, to bring an action as on a covenant or contract by the subscribing directors to pay out of that fund.

The objection, therefore, that in the present case, on the face of the declaration, the policy operated merely as a charge, cannot prevail.

It was, secondly, contended that, taking the declaration altogether, there was no joint promise by the defendants, but only a several and limited promise by each, i. e. to contribute to the amount of his share.

This objection is certainly of more weight than the other, and raises some doubt; for the allegation, that the defendants promised (which, as I have stated, means *jointly* promised) to be insurers on the terms of the policy, is not consistent with one of the terms of it, that no proprietor should be *in anywise subject* to any claims or demands, nor be *in anywise charged*, by reason of the said policy, beyond the amount of his share in the capital stock of the said Company, it being stated to be one of the original and fundamental principles of the said Com-

pany that the responsibility of the individual proprietors should, in all cases and under all circumstances, be limited to their respective shares in the said capital stock; for, if there be a joint contract by all the proprietors to pay if the capital stock be sufficient, each ^{is} liable, [*87 if the stock be sufficient, to have the full amount of the loss levied upon him; and so he is charged, *by reason of the policy*, beyond the amount of his share. It may be said, therefore, that, where one of the material and alleged fundamental terms of the joint contract is wholly irreconcilable with a joint liability, there is no joint contract at all, taking all the averments in the declaration together.

The sufficiency of the declaration is, therefore, questionable: but, as, upon demurrer, it must be taken that the contract is set out according to its legal effect, we must assume that the defendants did *jointly* contract in the manner alleged; and thus we must either reconcile the apparently inconsistent provision with the joint liability of the defendants to the plaintiff which follows from their joint contract, by supposing that it is a mode of regulating their liability inter se, though unnecessary to be introduced into a contract with the assured; or, if incapable of being reconciled, we must reject it as repugnant and void, as an attempt by the parties to do what by the law of England they cannot, contract jointly, with a separate limited liability to damages for the breach of that contract. I therefore think that the judgment of the Queen's Bench on the demurrers ought to be affirmed.

The next questions arise upon the bill of exceptions. On the trial, the articles of copartnership were put in, and the policy, which, it was in evidence, was the form always used by the Company (but not stated to be known or approved of by the defendants), and which was subscribed by three directors. This was the evidence applicable to the plea of Non assumpsit by the different defendants who pleaded it.

*The counsel for the defendant Gooden then objected that Lord Campbell ought to have directed the jury to find a verdict for him [*88 on that issue.

First, because no action at law would lie on the policy, as there was no contract to pay, but only a charge in equity.

Secondly, because the defendants were not jointly liable upon it, but, if liable at all at law, were only *severally* liable.

Thirdly, because no action would lie against Gooden, as *he* had not signed the policy.

Fourthly, because the promise alleged was general, to become insurers to the plaintiff, the promise proved, to pay out of the capital stock, in the terms of the policy.

Fifthly, because the policy was void by stat. 35 G. 3, c. 63, s. 11.

I have already intimated my opinion, that the fourth of these objections is untenable.

The third and fifth are equally so: indeed, the fifth, which was

stated in one of the pleas, was given up, as that plea was admitted to be bad, and as it could not but be, after the judgment of Lord Cranworth in the case of *Reid v. Allan*, 4 Exch. 326:† and the third is untenable, as no personal signature by the defendant is required; and, if the objection had been that the directors who actually signed were not authorized by the defendant so to do, the objection ought to have been pointedly and distinctly stated, which it certainly is not.

The only objections which remain to be considered are the first and second.

*89] *They are shaped in two ways. It is contended that, if the terms of the policy alone are looked at, the legal effect is, that the different proprietors do not thereby contract *jointly* at all; and that, if the policy is construed to be a *joint* contract of all the proprietors, the directors had no authority from the proprietors to make such a policy for them.

As to the second branch of this argument, the authority expressly given by the deed was certainly not pursued, and that in more than one respect. One difference is, that in the policy the stock or funds generally are pledged; in the deed, the power is to pledge only the funds *undisposed of* at the time of the *claim* under the policy, and that the directors ought to state that limitation in the policy, which they have not done; and, further, that no shareholder should be liable beyond the *unpaid* part of the share.

There is no evidence that this particular form of policy, so deviating from that directed by the deed, was sanctioned by the defendants: and whether unchartered companies of assurance against marine risks (which companies did not exist before stat. 5 G. 4, c. 114, and of the usage of which no evidence was offered) are on the footing of ordinary partnerships, so that an authority to the directors would be implied as to all strangers to the real authority, is a question on which I need not on the present occasion express any opinion; first, because I think that the want of authority in the directors to make policies binding on each proprietor was not objected to in a distinct manner, as it ought to have been, the only objection really made being that the defendants were not jointly liable on that policy, and that the policy was not *signed* by the *90] defendant Gooden; *and, secondly, because I think that, looking at the policy alone, and construing every part of it together, so as to give effect as far as is possible to its different provisions, it does not contain any *joint* contract with the assured *by all the proprietors*, and consequently no joint contract by the defendants.

In construing the instrument itself, we are not embarrassed by the admission of the fact, which on the demurrer was necessarily assumed, that the defendants did *jointly* contract. The question on the evidence is, *whether they did*. Nor are we to assume that the defendants duly subscribed the policy as assurers, which on the demurrer is admitted.

This also is a question to be determined on the construction of the instrument. What, then, is the legal effect of the policy, which is unquestionably a very confused and inartificial instrument, very difficult to understand, probably copied in a great measure from one of those used by the chartered insurance Companies, and perhaps without understanding its meaning?

The policy states that *the Company* are to bear the adventures and perils therein mentioned; to bear also the expenses of salvage; and the three directors subscribe in witness that *the Company* are content with the insurance; and it is declared and agreed between the Company and the assured, that the capital stock and funds of the Company shall alone be liable to make good all claims and demands whatsoever by virtue of that policy; and then follows the most important clause: that no proprietor of the Company shall be in *anywise* subject or liable to any claims nor in *anywise* charged, by reason of the policy, beyond the amount of his share in the capital, it being one of the original and *fundamental* *principles of the said Company that the responsibility of the said proprietors shall in *all cases* and under *all circumstances* be limited to their respective shares in the capital stock. It is impossible to doubt that the object of this clause (which, it is to be observed, is stronger than that in *Halket v. Merchant Traders' Company*, 18 Q. B. 960 (E. C. L. R. vol. 66),) was to protect the proprietors from personal responsibility to any persons whatever beyond a limited amount. It is emphatically stated to be *the original and fundamental principle* of the Company: and in construing their instrument we must give effect to this provision, so clearly expressed, if we can consistently with the other provisions contained in it. I think we can do this by construing the term "Company" to denote the funds of the Company, which alone are to pay, or by holding that it means not the whole body collectively, so as to make the whole body joint contractors, but each individual of the Company, so as to make each of them to contract to bear the loss in the same proportion as his share bears to the total capital, in the nature of a separate underwriter; and we thus give effect to the declared fundamental principle of the Company, which we could not do where it is to be construed in conjunction with an admitted joint contract of all the proprietors, which it must be when the question arises on demurrer. [*91]

It is true that there may be difficulties in ascertaining how much each is to pay in the case where an assurer has already been obliged to contribute to other losses; but a similar sort of difficulty would exist if all jointly undertook to pay out of the capital stock; if the capital stock had already been reduced by the payment of prior *claims, the residue only would be the capital liable to pay. But whatever difficulty might arise on this ground the assured must suffer; for I think [*92]

it quite clear that the individual proprietors were never meant to be responsible for any others than themselves.

I think it unnecessary to decide whether the subscribing directors were responsible on their policy, by reason of their signature, as contracting parties, or not; all I think it necessary to decide is, that there was no evidence, in this confused and ill-drawn instrument, warranting the Judge to say that there was any *joint contract* by the defendants with the plaintiff as alleged in the declaration. It may be that there is no contract at all; but, at all events, I think there is no *joint contract* by the proprietors who are not directors, with the plaintiff; and therefore Lord Campbell ought to have directed a verdict for Gooden on Non assumpsit; and, if so, all the other defendants were entitled to the benefit of that verdict.

This makes it unnecessary to discuss the last question, whether the direction of Lord Campbell was right as to the meaning of the terms "capital stock and funds;" but I do not mean to intimate that I think the ruling in that respect was not correct, though it is not the same that the Judges of the Queen's Bench appear to have put on those terms, according to the report in 19 Law J. (N. S.) Q. B. 37.(a)

Therefore I think judgment should be affirmed on demurrer.

Judgment affirmed on the demurrer. Venire de novo on the issues.

(a) And pp. 11—14, ante.

If the partnership consists of a large unincorporated association or *joint stock company*, trading upon a joint stock, it is usually regulated by special agreement; but the established law of the land, in reference to such partnerships, is the same as in ordinary cases, and every member of the company (whatever private arrangement there may be to the contrary between the members, and which is only a mischievous delusion) is liable for all the debts of the company. It is, however, the judicial language in some of the cases (Gibson, J., in *Hess v. Werts*, 4 Serg. & R. 361; Platt, J., in *Skinner v. Dayton*, 19

Johnson, 537), that the members of a private association *may* limit their personal responsibility, if there be an explicit stipulation to that effect made with the party with whom they contract, and clearly understood by him at the time. But stipulations of that kind are looked upon unfavourably, as being contrary to the general policy of the law; and it would require a direct previous notice of the intended limitation to the party dealing with the company, and his clear understanding of the terms of the limitation: 3 Kent's Com. 26. 27; Story on Partnership, 255.

***ELLEN BLAKE, Administratrix, &c., of JOHN BLAKE, deceased, v. The MIDLAND Railway Company.** [*93]

In an action, under stat. 9 & 10 Vict. c. 93, by the wife, husband, parent, or child of a person killed by misfeasance, the jury, in estimating damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only.

And, the Judge, in such a case, having left it in the option of the jury to give damages on all or any of these grounds, though intimating his opinion that there was no ascertainable damage on any ground but the last, a new trial was granted for misdirection.

Decisions of the Scotch Courts are received as authority here, if the law on which they turn be common to England and Scotland.

CASE. The declaration stated that, before and at the time of the committing of the grievances after mentioned, and after the passing of an Act, &c. (7 & 8 Vict. c. xviii., local and personal, public), "To consolidate the North Midland, Midland Counties, and Birmingham and Derby Junction Railways," defendants were the proprietors of a certain railway, to wit, the Midland Counties Railway, and were then possessed of certain engines, trucks, and carriages used on the said railway in carrying and conveying passengers and goods, and such other matters and things as might be offered for that purpose, from a certain place, to wit, Derby, to a certain other place, to wit, Sheffield, for hire and reward to defendants in that behalf: and defendants being such proprietors, and so possessed of the said engines, &c., as aforesaid, heretofore and after the passing of the said Act, &c., and before and at the time of the committing of the grievances next mentioned, and in the lifetime of John Blake (the intestate), to wit, on 19th May, A. D. 1851, received him the said J. B. into one of the said carriages on the said railways as a passenger, to be carried and conveyed thereon by defendants as such passenger on a certain journey, to wit, from Birmingham aforesaid to Sheffield aforesaid, for reward to defendants in that behalf; and by reason thereof it became the duty of *defendants to use [*94 due and proper care and skill in and about the conducting, carrying, and causing the said J. B. to be carried on his said journey, to wit, from, &c., to, &c., aforesaid, as such passenger on the said railways: Yet defendants, not regarding their duty in that behalf, heretofore, to wit, on the day and year aforesaid, did not nor would use due and proper care and skill in and about the conducting, carrying, and causing the said J. B. to be conveyed on his said journey, to wit, from, &c., to, &c., as such passenger on the said railways, but then took so little care, and conducted themselves so negligently, improperly, and unskilfully in and about the carrying and conveying the said J. B. on his said journey, and in conducting, guarding, managing, and directing the carriage in which he was such passenger as aforesaid, and the train to which the same was then attached, and the engines whereby the said train was then drawn upon and along the said railway, and also then took so little care, and conducted themselves so negligently, improperly, and unskil-

fully in and about the managing and directing a certain other train, called, to wit, a luggage train, of the defendants, and then consisting of divers trucks, to wit, 100 trucks, and a certain other engine of defendants then drawing the said last-mentioned train upon and along the said railways, that, by reason of such carelessness, negligence, default, and improper conduct of defendants in that behalf, the said train called, &c., and the said engine so drawing the same as aforesaid, then with great force and violence ran and was driven into, upon, and against the said carriage in which the said J. B. was such passenger as aforesaid, and into, upon, and against the said train to which the said last-mentioned carriage was so attached as aforesaid; and the *said carriage in which the said J. B. was such passenger as aforesaid then became and was wholly crushed and broken to pieces; and he the said J. B. was then also greatly hurt and wounded, and was then thrown and fell from and out of the said last-mentioned carriage, and the said train to which such carriage was attached as aforesaid, and was then cast to and against the ground with great force and violence, and was thereby then greatly bruised, lacerated, and wounded: And that, by reason of the said several hurts, &c., so occasioned to the said J. B. in his lifetime as aforesaid, he the said J. B. afterwards, and within twelve calendar months next before the commencement of this suit, to wit, on 20th May in the year last aforesaid, died: To the damage of plaintiff, as such administratrix as aforesaid, of 10,000*l.*: And therefore the plaintiff, as such administratrix as aforesaid, and for the benefit of herself the wife of the said J. B., according to the form of the statute in such case made and provided, (a) brings her suit, &c. Profert of letters of administration.

Plea, Not Guilty. Issue thereon.

The plaintiff's particular of demand was: "That this action is brought for and on her behalf, she being the wife of the said John Blake deceased, who was before and at the time of his death carrying on the trade and business of a merchant, in partnership with," &c., "at Sheffield, in the county of York, and from which the said J. B. was deriving an income of upwards of 500*l.* per annum: and that she in and by such action seeks to recover the sum of 10,000*l.* as damages of and from the *96] defendants by reason that, through and by their *negligence and improper conduct in managing their railways and certain carriages," &c., "on the evening of 19th May, 1851, near the Clay Cross Station, a certain collision took place, whereby he the said J. B., then being a passenger in a certain passenger train of the defendants on their railways, was hurt and wounded, and afterwards, in consequence of such hurts and wounds, in about one or two hours, died."

On the trial, before Parke, B., at the Derbyshire Summer Assizes,

(a) Stat. 9 & 10 Vict. c. 93: "An Act for compensating the families of persons killed by accidents."

1851, it was admitted, on the opening of the case, that a verdict must pass against the defendants, and that the only question was as to the amount of damages. The learned Judge then said that, according to a rule which had been several times acted upon by the Lord Chief Baron at Nisi Prius, and which in his own opinion was a right one, the measure of damages under the statute must be the pecuniary loss, and that only. The plaintiff's counsel, in the course of the cause, contended that the estimate ought not to be confined to the money damage, but should include the suffering and loss in other respects: and evidence was given of the terms on which the deceased and his wife had lived together. The defendants' counsel having again insisted upon pecuniary loss as the only measure of damages, Parke, B., said: "I cannot say to the jury that this is the only thing; I can only give them my notion of it, and they must settle it themselves." And, in his summing up, he stated to the jury that, at common law, an action founded on estimate of a life was not maintainable; that, by statute, it now was, and a jury might give such damages as they considered to have been sustained: that he thought there was great difficulty in fixing any measure but that of pecuniary injury: but *that, if they considered the plaintiff [97 entitled to any compensation for the bereavement she had sustained, beyond the pecuniary loss, they were to make their estimate accordingly.

The deceased had been a partner in a mercantile house, deriving an income from the profits of the trade, as well as from some permanent sources of revenue. The whole was calculated at 850*l.* a year. The learned Judge suggested to the jury, as a mode of estimating the pecuniary loss, to take so much per annum of that sum as a wife living with her husband and maintained according to her station in life might be supposed to enjoy; and, considering this as an annuity, to reckon its value at so many years' purchase as it was worth, reference being had to the ages (34 and 26) of the husband and wife: then to deduct from this gross value the amount in money which the wife would become entitled to by the death of her husband (namely, his share of the partnership profits for a term of from four to five years, according to the deed of partnership, and dower upon his real property): and to award the balance (which his Lordship reckoned at about 6000*l.*) as compensation under the statute. It was objected that in this estimate allowance was not made for certain contingencies which might have lessened the annual amount supposed to be enjoyed by the wife during her husband's lifetime; and the learned Judge admitted that these ought to be considered, though it was difficult to estimate them; and, subject to these observations, he left the case to the jury, who found a verdict for the plaintiff with 4000*l.* damages.

Sir *F. Kelly*, in the ensuing term, moved for a new *trial, on the grounds: first, that the damages, if calculated on pecuniary [98

loss only, were excessive; that the jury had not been directed with sufficient exactness on this head by the learned Judge, and that deductions, not pointed out by him, should have been taken into calculation; and, secondly, that the Judge should have expressly directed them to take nothing into consideration in the assessment of damages but pecuniary loss; the statute not allowing compensation for any other loss, or for mental suffering. A rule nisi was granted. In this vacation, (a)

Sir *F. Thesiger*, *Mellor*, *Miller*, Serjt., and *Flood* showed cause.—It must be admitted that the verdict cannot stand if the Act 9 & 10 Vict. c. 93, gives compensation for pecuniary loss only. That statute enacts, by sect. 1, that, whenever the death of a person shall be caused by such wrongful act, neglect, or default as would have enabled the party injured, if living, to recover damages by action, the person who would have been liable in that case shall be liable to an action for damages notwithstanding the death: and, by sect. 2, “that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered *99] from the defendant, shall be divided amongst the before *mentioned parties in such shares as the jury by their verdict shall find and direct.” Under the former law there could be no action for damages if death ensued; though a pecuniary imposition was made in some cases by way of deodand. That, however, was abolished (b) a few days before the passing of the Act now in question. [Lord CAMPBELL, C. J.—Deodand was taken where the mischief happened without any negligence, but by pure accident: (c) a strange peculiarity.] The kind of remedy here sought was given by the civil law, and is familiar in the law of Scotland, which country is in express terms excluded from the operation of the present Act by sect. 6, the Legislature apparently considering that, by this statute, the law of England was simply assimilated to the existing law of Scotland. Indemnification to the relatives in the case of death by criminal acts was known in that country by the name of assythment; (d) but an action for damages was maintainable there in the case of death by misconduct generally: and the damages were not measured by pecuniary loss only. It is said in *Ersk. Inst.* 592, note 13: “Solatium for wounded feelings is allowed in cases of breach of promise of marriage.” “So also where damages are sought

(a) February 10th. Before Lord Campbell, C. J., Patteson, Coleridge, and Wightman, J.

(b) Stat. 9 & 10 Vict. c. 62.

(c) See *Regina v. Polwart*, 1 Q. B. 818 (*E. C. L. R.* vol. 41).

(d) See *Ersk. Inst.* 1074, B. 4, Tit. 4, s. 105, Ed. 1823.

for the loss of a father, husband, &c., through the improper negligence or misconduct of a party, they are not to be estimated merely by the pecuniary advantages which the family derived from his exertions in business; but a solatium will be given, even where 'the death of the sufferer, instead of being a loss to his family, might be regarded as a benefit, on account of his *bankruptcy and dissipated habits;'" [*100 for which *Black v. Caddell*, Dict. Decis. vol. 31 & 32, p. 13905, and *Brown v. Macgregor*, Fac. Collect. Feb. 26, 1813, p. 232, 233, are cited. In *Children of Forest v. Clerkington*, Dict. Decis. vol. 31 & 32, p. 13903, compensation by way of assythment was made to illegitimate as well as to legitimate children. The law of assythment is treated of in *Bell's Principles of the Law of Scotland*, p. 749, 4th ed., where this remedy is said to be given by the law "both as indemnification and as solatium." In *Duncan v. Findlater*, 6 Cl. & Fin. 894, which came before the House of Lords on appeal from the Court of Session, before the passing of stat. 9 & 10 Vict. c. 93, the respondent, whose son had been killed by the alleged negligence of the appellants (turnpike trustees), recovered 500*l.* damages in the Scotch court, as a solatium for the death of his son. The liability of the trustees was disputed on the appeal: but Sir John Campbell, Attorney-General, for the appellant, admitted that, although, by the English law, if a man's wife or son were killed by negligence, he could have no action, because "the English law allows no solatium in this respect," "the Scotch law" "says more sensibly, that in such a case a solatium shall be granted to the person injured in his happiness and circumstances by the death of his wife or child." It is reasonable to suppose that the Act of Parliament subsequently passed for England contemplates an equally extensive remedy. On a similar principle to that of the Scotch law, it has been held in our Courts that for a battery of the wife the husband may sue without joining her as a plaintiff, in respect of the loss and damage sustained by him from the want of her company and aid; *Guy v. Livesey*, Cro. Jac. 501, [*101 **Hyde v. Scyssor*, Cro. Jac. 538. In the case of seduction, a parent is allowed to recover compensation for the injury to his feelings. [COLERIDGE, J.—There must be a loss of service.] In the class of cases where a husband recovers for ill treatment of his wife, neither loss of service nor expense of medical attendance need be proved. Blackstone, 3 Comm. 139, treating of "injuries that may be offered to a person considered as a husband," mentions the remedy claimable by him solely, where the loss is of the wife's consortium. The gist of the action for criminal conversation is (as Lord Kenyon lays it down in *Weedon v. Timbrell*, 5 T. R. 357) "satisfaction" to the husband "for a civil injury done to him" by depriving him of the comfort and society of his wife. In *Winsmore v. Greenbank*, Willes, 577, which was an action for enticing away and detaining the plaintiff's wife, Willes, C. J., referring to the objections taken in arrest of judgment, said: "The

second general objection is, that there must be *damnum cum injuria*, which I admit:" but he adds afterwards "there is a consequence laid, that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune," &c. If, in the case of a wife, the mere loss of society be an injury for which damages may be assessed, the wife being still alive, a wife may recover on the same principle for a wrong which takes from her the society of her husband; and it makes no difference that the same wrong has caused his death, the common law objection on this ground being removed by the Act of Parliament. By sect. 2 of this statute, the action is to be for the benefit of the "wife, husband, parent, and child" of the deceased; and, by *102] sect. 5, "the word 'parent' shall include father and mother, and grandfather and grandmother, and stepfather and stepmother." But it is, comparatively, seldom that these relations, the remoter ones at any rate, suffer pecuniary loss in the case contemplated; the inference is that not this only, but family feeling, was considered in the enactment. It may be argued from the provision in sect. 2, giving the action to the executor or administrator of the deceased, that the wrong is considered solely as affecting the pecuniary estate. That it affects the estate may be one reason for this enactment: but the executor who acts on this ground may well be chosen to enforce the other redress also: and, as there would often be many persons entitled to it under the Act, it was expedient that one individual should be selected to act for all, according to their respective claims. Sect. 4, which requires the plaintiff to deliver a particular "of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered," seems to contemplate something more than a simple estimate of pecuniary loss. [COLERIDGE, J.—Suppose one man is killed, leaving a wife, children, father, and mother; a second is killed leaving only a wife: all other circumstances being the same, should larger damages be recovered in the first case than in the last?] Clearly they should. [PATTESON, J.—If a husband sues for the injury by loss of consortium, must he sue as administrator to his wife?] He would sue merely in a nominal capacity: the act in such a case allows the party to be named as executor merely that there may be one *dominus litis*. [WIGHTMAN, J.—In the cases of seduction and criminal conversation, bad character is given in *103] evidence to reduce the damages. Could the same be done here? COLERIDGE, J.—In the case of a daughter, evidence is given of the father's character, and of the kind of house he kept. Lord CAMPBELL, C. J.—It might be, in a case like the present, that the husband had deserted his wife and children, and was a curse to his family.] In estimating solatium all the circumstances must be considered. The inquiry may be difficult; but that does not affect the principle. Evi-

dence was given here of the terms on which the husband and wife lived.

There is, indeed, a reported case at *Nisi Prius*, to which allusion seems to have been made in moving for this rule, where the present Lord Chief Baron is said to have laid it down that, in an action under this statute, the question was confined to pecuniary loss; *Gillard v. Lancashire & Yorkshire Railway Company*, 12 *Law Times*, 356.^(a) A widow there claimed compensation for the loss of her husband; and the plaintiff's counsel proposed to prove that, after the husband's death, she was delivered of a child which, in consequence of the shock she had suffered, was sickly in constitution. This was objected to as introducing a kind of injury for which the widow, who sued on her own account solely, could not ask compensation: and Pollock, C. B., said: "It is a pure question of pecuniary compensation, and nothing more, which is contemplated by the Act." "I think it is utterly impossible for a jury to estimate any sum as a compensation for the injured feelings of the survivors; all that is left which is appreciable after the death of the party killed is the pecuniary loss sustained by his family, and this Act enables them to recover that which the deceased would himself have sued for, had *the accident not terminated fatally. [*104 The framers of the Act never could have meant to give compensation to the parent for the mere deprivation of his son, or the widow for that of her husband. If that were so, a man of wealth losing his only child, the heir of his honours and fortune, and the object of all his human hopes, might be entitled to claim an almost indefinite sum. Nothing on earth could compensate such a man for such a loss. This shows that the Act could never have been intended to apply to anything beyond the mere actual pecuniary compensation." The plaintiff's counsel observed: "In that view, a widower would not be entitled to sue for compensation for the loss of the society and comfort of his wife:" and the Lord Chief Baron said: "Clearly not, unless her death is the cause of a pecuniary loss to her husband." But the learned Judge entertains views which perhaps may be deemed peculiar on the subject of compensation for personal suffering. When at the bar, his Lordship, as counsel for the plaintiff in *Carpue v. London & Brighton Railway Company*, 5 Q. B. 747 (E. C. L. R. vol. 48),^(b) avowedly withdrew from consideration as a subject of damages the bodily suffering which the plaintiff had undergone; the party himself concurring in the adoption of this view. Such, however, has not been the general course in actions of this kind by parties still living. Again, in *Armsworth v. South Eastern Railway Company*, 11 *Jurist*, 758,^(c) an action on the statute by a widow on behalf of herself and her children, Parke, B.,

(a) Court of Exchequer, December 20th, 1848.

(b) Where, however, this circumstance is not stated.

(c) Croydon Assizes, 1847.

in summing up, said: "A very great difficulty presents itself; for you cannot estimate the value of a person's life to his relatives. No sum *105] of money could compensate a child for the loss of its parent; and it would be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. Here you must estimate the damage by the same principle as if only a wound had been inflicted. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life; and in the present case you are not to consider the value of his existence as if you were bargaining with an annuity office; for in that view you would have to calculate all the accidents which might have occurred to him in the course of it, which would be a very difficult matter. I therefore advise you to take a reasonable view of the case and give what you consider a fair compensation." But difficulty is no ground for narrowing the operation of a statute framed to introduce an important remedy: and the difficulty is not greater than that which occurs in other cases, libel for instance, where the gist of the complaint is an injury not affecting mere pecuniary interests. The statute itself does not use any language confining the remedy to pecuniary injury. Had that been intended, no more was necessary than to insert the word "pecuniary" before "injury" in sect. 2. An analogy may be drawn from the practice adopted by the Courts under stat. 4 Ed. 3, c. 7. Before that Act (as the clause recites) executors could not sue "for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life." By cap. 7 it is enacted "that the executors in such cases shall have an action against the trespassers," and recover as the testators might have done if living. And, as is observed in 1 Williams on Executors, 669 (4th ed.), "The Act 4 Ed. 3, *106] being a remedial law, has always been expounded largely: and though it makes use of the word trespasses only, has been extended to other cases within the meaning and intent of the statute." Upon the same principle stat. 9 & 10 Vict. c. 93, ought rather to be extended than restricted in the construction.

Humfrey, Macaulay, and Boden, contra.—The learned Judge ought to have told the jury in express terms that the inquiry should be limited to pecuniary damages. His charge (if not otherwise exceptionable) had the generality which was complained of in *Elliott v. South Devon Railway Company*, 2 Exch. 725,† (a) where the issue was, whether or not the railway passed through a "town" within the meaning of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 11, and the Judge told the jury that the word "town" was to be understood in its ordinary and popular sense; and that it was for them to decide whether the plaintiff's land was in a "town," within the meaning of the Act;

(a) See *Regina v. Cottle*, 16 Q. B. 412 (E. C. L. R. vol. 71).

and a new trial was granted. And, the learned Judge here having at first intimated an opinion that pecuniary damage only could be recovered, the defendants' counsel were led to omit points in cross-examination which they might otherwise have urged. [Lord CAMPBELL, C. J.—Were you instructed to show by cross-examination that the deceased and his wife lived on very bad terms?]

As to the main question: This is an Act to be guardedly construed, as it introduces a new principle. [Lord CAMPBELL, C. J.—So did stat. 4 Ed. 3, c. 7.] The only "injury resulting from such death" which the Court can notice, under sect. 2, is pecuniary loss. The attempt *to carry this provision further leads to difficulties which show that it cannot have been intended. Suppose the deceased person to leave a wife and twelve children: the pecuniary injury they suffer by the loss of his protection is apportionable: but, if each is entitled to compensation for mental suffering, every one is entitled alike to the full amount which can be supposed equivalent to one person's distress of mind. Is then the defendant in such a case to pay full damages twelve times over? The only safe ground of estimate is the loss in pecuniary estate. And here the widow is in some respects a gainer. [COLERIDGE, J.—Your construction would make the killing, in some instances, no injury at all.] Another question is, whether, in such a case as this, habitual misconduct of the husband could be alleged in reduction of damages. [Lord CAMPBELL, C. J.—The answer may be that, if the wife asks damages for loss of society, such evidence is let in: if an executor is so indiscreet as to claim for the loss of a father whose removal is a benefit to the family, he must take the consequence.] None of the suggested difficulties will arise if the injury be regarded as pecuniary. [Lord CAMPBELL, C. J.—There may be a power to claim ultra that, but no obligation upon the executor to prefer such claim. He is to do what is best for the estate.] It is suggested that "pecuniary" might easily have been inserted before "injury" in sect. 2, if the Legislature had intended such a restriction: but the word is not necessary. In *Halford v. Kymer*, 10 B. & C. 724 (E. C. L. R. vol. 21), which turned upon stat. 14 G. 3, c. 48, s. 1, forbidding insurances upon lives in which the assured has "no interest," this Court held it clear *that "no interest" must be read as "no pecuniary interest." [108] The whole context of the present Act agrees with the interpretation contended for. The relatives for whom compensation is provided by sect. 2 are those most likely to be in a situation of pecuniary dependence on the deceased. If distress of mind on the loss of a near relative had been contemplated, brothers and sisters would have been mentioned. The particular in this case (which the plaintiff is required to deliver by sect. 4) gives no intimation of anything beyond a pecuniary claim. [Lord CAMPBELL, C. J.—No objection was made here on that ground.] An analogy can scarcely be drawn from the cases in which a husband

may sue at common law for loss of consortium: that analogy did not prevail even under the common law; for a wife could not recover compensation in respect of consortium, even when husband and wife were both living.

Cur. adv. vult.

COLERIDGE, J., (a) in the same vacation (February 21st), delivered the judgment of the Court.

This case turns entirely upon the construction of the recent statute, 9 & 10 Vict. c. 93; and the important question is whether the jury, in giving damages apportioned to the injury resulting from the death of the deceased to the parties for whose benefit the action is brought, are confined to injuries of which a pecuniary estimate may be made, or may add a solatium to those parties in respect of the mental sufferings occasioned by such death?

The plaintiff's counsel, in support of the latter alternative, have
*109] mainly relied upon certain decisions of the Court of Session in Scotland, which they have very properly brought under our notice. If those decisions had been pronounced upon a law common to both parts of the United Kingdom, we should have been equally ready to be bound by them as if they had been pronounced by the Courts in Westminster Hall; but it is expressly enacted that stat. 9 & 10 Vict. c. 93, shall not apply to Scotland; and the Scottish law of assythment is wholly alien to the common law of England. In this, as in other instances, an improvement in our law may have been suggested by the existing code in Scotland; but may have been adopted with modifications. It is quite clear that the law of assythment has not been introduced into England in its full latitude; or compensation for the loss of a parent by a wilful act, neglect, or default, would be due to illegitimate as well as legitimate children; and the amount of compensation would depend upon the extent of the culpa proved against the parties from whom the compensation is claimed. It may be, though we need not affirm it, that those decisions are in strict conformity to the law of Scotland, and would all have been affirmed on appeal to the House of Lords; but they can be of very little assistance to us in construing this Act of Parliament. When we are performing this duty, our only safe course is to look at the language which the Legislature has employed.

The title of this Act may be some guide to its meaning: and it is "An Act for compensating the families of persons killed;" not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly given action may be
*110] maintained although death has ensued; *the argument being that the party injured, if he had recovered, would have been entitled to a solatium, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but gives to the representative a totally

(a) Coleridge and Crompton, J., were the only Judges in Court.

new right of action, on different principles. Sect. 2 enacts that "in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum, independent of all pecuniary estimate, to soothe the feelings; and the division of the amount strongly leads to the same conclusion: "And the amount so recovered" "shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." By what rules ought the jury to be guided in this apportionment? Are they to inquire into the degree of mental anguish which each member of the family has suffered from the bereavement? Then not only the child without filial piety, but a lunatic child and a child of very tender years, and a posthumous child on the death of the father, may have something for pecuniary loss, but cannot come in *pari passu* with the other children, and must be cut off from the solatium. It seems to us that, if the Legislature had intended to go the extreme length of giving, not only compensation for pecuniary loss, but a solatium to all the relations enumerated in sect. 5, a father and mother, a grandfather and *grandmother, a stepfather and step-mother, a son and daughter, a grandson and granddaughter, a [*111 stepson and stepdaughter, language more clear and appropriate for this purpose would have been employed.

An argument has been drawn from sect. 4, which requires the plaintiff to deliver the particulars of the nature of the claim in respect to which damage shall be sought to be recovered; as if it were so much for pecuniary damage and so much for solatium. But these words will be abundantly satisfied by a statement of the manner in which the pecuniary loss to the different persons for whom the action is brought is alleged to have arisen.

We conceive that the Legislature would not have thrown upon the jury such great difficulty in calculating and apportioning the solatium to the different members of the family without some rules for their guidance. When an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can with little difficulty award him a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss. There may be a calculation of the pecuniary loss sustained by the different members of the family from the death of one of them: but, if the jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of defendants. We must recollect that the Act we are construing applies not only to great Railway Companies

but to little tradesmen who send out a cart and horse in the care of an apprentice.

For these reasons we are of opinion that the learned Judge at the *112] trial ought more explicitly to have told the *jury that, in assessing the damages, they could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband: And that, as the damages certainly exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive.

The rule for a new trial must therefore be absolute. It is a new trial on the ground of misdirection. Rule absolute.

RENSHAW v. BEAN.

Plaintiff, being reversioner of a house which adjoined premises in the occupation of defendant and had ancient windows, rebuilt the house, added an upper story, opened windows in that story, and enlarged the ancient windows and otherwise altered their position: such rebuilding and alterations being within twenty years of the commencement of the action. Defendant subsequently rebuilt his premises, and thereby darkened the windows in both the upper and the lower stories of plaintiff's house.

Held, in an action by plaintiff, as reversioner, for this obstruction, that, the plaintiff having, by his alterations, exceeded the limits of his right, and it being, through the nature of such alterations, impossible for the defendant, in the lawful exercise of his own rights, to obstruct such excess without at the same time obstructing the plaintiff's former right, the plaintiff must be considered as losing his former right, at all events until he restored his house to its original condition.

Semle, that such alteration did not destroy the right altogether.

Held, further, that a defence founded upon the fact of such alteration by the plaintiff, and the impossibility of a partial obstruction, was properly raised under a traverse of plaintiff's right to the windows.

CASE. The action was commenced on 18th November, 1850. The declaration stated: That, before and at the time of the committing, &c., a certain dwelling-house, surgery, and premises, with the appurtenances, situate in the town of Nottingham, &c., were in the possession of one Booth Eddison as tenant thereof to plaintiff; and a certain building, warehouse, counting-house and premises, with the appurtenances, situate in the town, &c., and near to and adjoining the first-mentioned dwelling-house and premises, and partly over and above the said surgery, were *113] in the *occupation of one George Shelton, Jun., as tenant thereof to plaintiff, the reversion of and in the said several premises then and still belonging to plaintiff; and in which several and respective premises, before and at the times of the committing, &c., there were and still of right ought to be divers, to wit, ten, windows, through which the light and air during all the time aforesaid ought to have entered, and until the time of the committing, &c., did enter, and still of right ought to enter, into the several premises hereinbefore respectively mentioned and in the occupation of plaintiff's said tenants respectively, for the convenient and wholesome air and occupation and enjoyment thereof:

Yet defendant, well knowing the premises, but intending to injure plaintiff in his reversionary estate, &c., whilst the said several premises were so occupied by the respective tenants thereof, and plaintiff was so interested therein as aforesaid, to wit, on, &c., and on divers other days, &c., wrongfully and injuriously rebuilt and raised and added to a certain messuage, building, and premises of defendant near to the said windows respectively, and made the same of a much greater height and dimensions than the same had previously been, and wrongfully and injuriously kept and continued the said last-mentioned messuage, building, and premises so wrongfully added to and raised as aforesaid for a long time, to wit, &c.; by means of which said several premises the light and air during all the times aforesaid were and still are prevented from entering into and through the said windows or any of them into the said respective premises so in the possession of plaintiff's said tenants respectively, in which plaintiff was so interested as aforesaid; and the same *premises have been and are thereby rendered [*114 dark, close, uncomfortable, and unwholesome, and much less fit and commodious for habitation, &c.; and the same have been and are greatly deteriorated in value; and plaintiff hath been and is greatly injured in his reversionary estate and interest, &c.: to the damage, &c.

Pleas. 1. Not Guilty.

2. That there were not of right, at or during any or either of the said times of the committing, &c., any or either of the said windows through which the light or air ought to have entered, or still of right ought to enter, in manner and form or for the purpose in the declaration alleged. Conclusion to the country.

Issue was joined on each plea.

On the trial, before Coleridge, J., at the Nottingham Spring Assizes, 1851, a verdict was found for the plaintiff with 1*s.* damages, subject to the opinion of this Court upon the following case.

The premises in the occupation of the plaintiff's tenants, mentioned in the declaration, adjoin to each other; and the windows in question open into a court or passage(a) leading out of the High Pavement in the town and county of Nottingham. The defendant was the owner of premises very near, and in parts adjoining, the plaintiff's premises, and situate on the opposite side of the said court or passage. The defendant rebuilt, enlarged, and raised his premises shortly before the action was brought, and thereby darkened and obstructed the windows on the ground floor, first floor, and second floor of the premises in the occupation of *the plaintiff's tenants: and the only question in dispute [*115 is as to the right to the windows in question.

The premises in the occupation of the plaintiff's tenants had been rebuilt about eighteen or nineteen years before the rebuilding of the defendant's premises; and none of the identical windows in respect of

(a) See the judgment of the Court, p. 130, post.

which the action was brought had existed for twenty years before the obstruction complained of. In the premises which previously occupied the site of the plaintiff's present premises there was the same number of stories as in the present premises; and there were windows on the ground floor, first floor, and second floor, which had existed for a period considerably exceeding twenty years; but in rebuilding the plaintiff's premises some of the windows were enlarged, and the situations of others were changed; and no one of the present windows was in all respects identical in point of size and situation with any one of the previously existing old windows.

The defendant contended that by these alterations, the nature of which is hereafter specified, the ancient rights had been lost, and that no new rights had been acquired, in consequence of the period of enjoyment of the present windows falling short of twenty years; and that therefore he was entitled to a verdict upon the second plea, which denied the rights alleged in the declaration: and this is the point for the consideration of the Court.

The case then referred to a plan which, it was agreed, might be referred to by the Court, and on which were shown the premises in the occupation of plaintiff's tenants, and the windows now in question, all of which looked into the before-mentioned court, some to the North, *116] some to the East, and two to the South. They were numbered on the plan, 1 to 12. Windows 1 to 7 were in premises occupied by Mr. Booth Eddison; 8 to 12 lighted a warehouse, counting-house, and premises in the occupation of Mr. George Shelton. The case stated that all were in a greater or less degree darkened and obstructed by the rebuilding and alteration of the defendant's premises. It then proceeded as follows.

When the premises occupied by Mr. Booth Eddison were rebuilt, the new building was made nine or ten feet higher than the old one, and the height of the rooms of all the floors was raised; and, as a consequence of this alteration, the windows in all the floors were all made and placed somewhat higher than they were in the old premises, and other changes were made as hereinafter particularly mentioned. On the ground floor, the window No. 1 was in exactly the same situation as an old window previously existing there, except that the new window was made about four inches narrower and about one foot higher than the old one. With respect to the window No. 2, the wall in which it was made stood in the same situation as the present wall, but there were two windows previously lighting the room now lighted by No. 2. These old windows were narrower windows than the present window, and were separated from each other by about eighteen inches of wall. The present window occupies the situation of this intervening piece of wall, and a part of the situation of each of the old windows; but the outer sides of the old windows extended farther towards the North and

South respectively than the present window. The sill of the present window is at the same elevation from the ground as the sills of the former windows; but the top of the present window is about a foot higher than the top *of the old windows. The room which is lighted [*117 by No. 2 is now a breakfast parlour and library. In the old building it was used as a counting-house. With respect to the window No. 3, the wall in which it is placed stands in the same situation as the old wall; and the present window, to the extent of about one-third of its dimensions, occupies the same situation as part of an ancient window in the previous building: the sill is at the same elevation; but the top of the present window has been raised so as to be about a foot higher than the top of the old window in that situation: the space occupied by the remaining two-thirds of the present window was occupied by part of a brick wall in the old building. The room now lighted by this window is used as a surgery. In the old premises there were two rooms in the same situation, a packing room and a pantry, each lighted by a separate window; and at the time of the alteration one of these old windows was stopped up. With respect to the windows Nos. 4, 5, 6, and 7, they occupy nearly the same positions as four ancient windows previously existing in the former premises; but, in consequence of the raising of the floors of the present building, the sills and tops of the present first floor windows are higher than those of the previous windows: but the greater portion of each of the present windows is in the same situation as the corresponding old window; and the use made of the rooms and places lighted by these windows is substantially the same in the new as it was in the old premises.

With respect to the windows to the plaintiff's warehouse and premises in the occupation of Mr. George Shelton, the windows numbered 8, 9, and 10 occupy nearly the same situations as three ancient windows *previously existing in the former premises, except that, in consequence of the floors having been raised in height, the sills and [*118 tops of the present windows are higher than the sills and tops of the old windows; but the greater portion of each of the present windows is in the same situation as the corresponding old window on the second floor; and the rooms lighted by the present and former windows were used for the same purposes. With respect to the remaining windows Nos. 11 and 12, which look down the yard towards the South, the wall and building in which these two windows are placed was, at the time of the rebuilding of the premises, raised and brought forward towards the South about eight feet beyond the situation of the old wall. The windows 11 and 12 were placed in the new wall so brought forward as aforesaid in pretty nearly the same situation, with respect to elevation, as two old windows in the same situation which previously lighted the staircase of the old building; but, in consequence of the wall and building in which the staircase stands having been so brought forward, ne

part of the present windows occupies any part of the situation of the old staircase windows. And, in consequence of this part of the building having been brought forward, the windows of the warehouse and counting-house, Nos. 8, 9, and 10, and also the windows of Mr. Eddison's surgery and bedroom over it, Nos. 3 and 7, were deprived of some of the light which had previously been enjoyed by the windows that formerly stood in similar situations in the old premises.

The rebuilding of the plaintiff's premises was completed in or shortly after the month of October, 1831: and the several lights had been *119] enjoyed in their altered *state without interruption until about the months of August and September, 1850, when the defendant's obstructions took place.

The question for the consideration of the Court is, Whether the plaintiff is entitled to recover damages in the present action in respect of the obstruction of all, or any, and which, of the windows in question; and the verdict is to be entered accordingly. The Court to have the power of determining any question of fact arising from the case, and which (but for this power) they might consider proper to be submitted to a jury. The pleadings to be referred to as part of the case.

The special case was argued in last Hilary term.(a)

G. Hayes, for the plaintiff.—As to the windows 11 and 12, which have been advanced in the form of a bow, no part of them coinciding with the former site, it must be admitted that *Blanchard v. Bridges*, 4 A. & E. 176 (E. C. L. R. vol. 31), is a decisive authority for the defendant. With respect to the other windows, which have been altered chiefly by elevating the upper part, in consequence of the raising of the plaintiff's house, but which, to a great extent, merely occupy the former site, the easement is modified, not extinguished. The principle, to be deduced from *Luttrell's case*, 4 Rep. 86 a, is, that an easement is not destroyed by alterations in the mode of enjoyment, which leave the substance of the thing enjoyed the same, and do not impose a greater burden upon those against whom the easement is claimed. And therefore, in the case *120] of enlarged windows, the old apertures remaining, the *former privilege continues as to them, though not as to new additions. In a case of *Dougal v. Wilson*, 2 Wms. Saund. 175 a, 6th ed., cited by Mr. Serjt. Williams in note (2), to *Yard v. Ford*, 2 Wms. Saund. 172, *Wilmot, C. J.*, said: "If my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd. But the action can only be maintained for damages so far as the lights originally extended, and not for an increase of light by enlarging the windows recently." In *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69, which was an action for obstructing window lights by erection of a paling, "the windows had never been completely open, but had had blinds fastened to the window

(a) January 27th, before Lord Campbell, C. J., Patteson and Wightman, Js.; and 23th, before Lord Campbell, C. J., Patteson, Coleridge, and Wightman, Ja.

frames, which prevented the plaintiff from seeing into the defendant's garden, the blinds sloping upwards, and only serving for the admission of light:" and the defence was, "that the plaintiff had thrown down those blinds, and thereby opened a full and uninterrupted view over the defendant's premises and thereby deprived him of the privacy and retirement of his garden." It was admitted that the paling made the plaintiff's rooms darker than they were before the blinds were removed; and Lord Kenyon thereupon held that the plaintiff was entitled to recover. That is a stronger case than the present. In *Martin v. Goble*, 1 Camp. 320, a malt-house had been converted into a parish workhouse; and, in an action for obstructing the lights, it was held that, notwithstanding this alteration, the premises were still entitled to as much light as was formerly enjoyed for the purposes of the malt-house. In *Chandler v. Thompson*, 3 Camp. 80, a small window in the plaintiff's house, overlooking the defendant's premises, was enlarged *in height and [*121 width: the defendant erected a building which covered part of the old aperture but allowed more light to enter than had been enjoyed in the former state of the window. But Le Blanc, J., "was of opinion that the whole of the space occupied by the old window was privileged; and that it was actionable to prevent the light and air from passing through this, as it had formerly done. That part of the new window which constituted the enlargement might be lawfully obstructed: but the plaintiff was entitled to the free admission of light and air through the remainder of the window, without reference to what he might derive from other sources." The first case in which it has been laid down "that a party may so alter the mode in which he has been permitted to enjoy this kind of easement, as to lose the right altogether," is *Garritt v. Sharp*, 3 A. & E. 325 (E. C. L. R. vol. 30); and there the circumstances were peculiar. The light had formerly been admitted through crevices in a barn, which the plaintiff had, by cutting, formed into windows. It was very doubtful whether the crevices had not been accidental, and, consequently, whether the enjoyment of light through them was any evidence that an easement had ever been granted to the plaintiff. In *Thomas v. Thomas*, 2 Cro. M. & R. 34,† S. C. 5 Tyr. 804, the plaintiff alleged a right to have the rain flow by a certain channel from the roof of his house to the premises of the defendants, which easement they had obstructed by building a wall on their ground: the defendants answered that the plaintiff had lately raised the wall from which the rain so descended, by an additional three feet: and it was argued that "the exercise of an easement is an infringement upon the *right of another, and must be strictly pursued:" and that, here, [*122 "the alteration in the enjoyment of the right destroyed it, and the defendants were justified in building up their wall, as they would have been in case no easement whatever had existed." But the Court of Exchequer held that the plaintiff was entitled to recover. Alder-

son B. said: "How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim? It has been held in the case of lights, that where a party enlarges an ancient window, the owner of the adjoining land cannot obstruct any part of the light which ought to pass through the space occupied by the ancient window. If the act of the defendants is injurious to the plaintiff's original right, it is not the less so, because it is injurious also to a further right which the plaintiff claims." Subsequently to this case *Blanchard v. Bridges*, 4 A. & E. 176 (E. C. L. R. vol. 31), was decided, in which the Court of Queen's Bench, recognising the authority of *Chandler v. Thompson*, 3 Camp. 80, admitted that, where a window was merely enlarged, the original aperture remaining, "that aperture remained privileged as before the enlargement." The argument, if it could prevail, that the easement of window light ceases on any change, however trivial, in the dimensions of the window, would be of very serious consequence, especially in ancient towns.

Mellor, contra.—By the general rules of common law, any man may build to the extremity of his own land: if that right is ever restrained it is by an enjoyment which he has permitted another person to have *123] during *twenty years, incompatible with that exercise of right. But the question then is, in what enjoyment has he acquiesced? To what precise extent has he given up his rights, and made his own tenement a servient one? The enlargement of windows may affect the neighbouring landowner very materially, both as abridging his right to elevate his own buildings, and as lessening the privacy of his tenement, a privilege on which the law puts a value as well as upon the access of light and air; *Cherrington v. Abney*, 2 Vern. 646, and *Garritt v. Sharp*, 3 A. & E. 325, 328 (E. C. L. R. vol. 30), where Lord Denman, C. J., observed, as to the conversion of crevices into windows: "They might overlook the neighbouring premises." If the new work is an encroachment, the party invaded in his rights may obstruct the encroachment; and, if it has been so made that the obstruction cannot operate upon what is unprivileged without also affecting what is privileged, that consequence must be submitted to: all may be obstructed. And, as was observed in the judgment of this Court in *Blanchard v. Bridges*, 4 A. & E. 191 (E. C. L. R. vol. 31), if there be an encroachment, the degree of it cannot safely be left to the consideration of a jury. [Lord CAMPBELL, C. J.—You would say that an inch ought to have the same consequence as several feet.] An inch might be a matter too small to be estimated by the law: but the question is, whether it can be perceived that the alteration imposes some new burden upon the neighbouring tenement: if it does, the obstruction may be total. [Lord CAMPBELL, C. J.—Where a window is heightened, it might be difficult to obstruct the upper part without darkening the lower.] In a case which was tried

at Lincoln, something of the *kind was attempted, by an iron plate at the end of a rod. But the true consequence of the [*124 encroachment is, that the party making it incurs the penalty of losing his right. It is not practicable, in a case like the present, to obstruct merely what is in excess; and, if it remains unobstructed for twenty years, an adverse right is gained. Nothing, therefore, has been done here which was not necessary for the purpose of preventing a wrong. This view of the subject agrees with the doctrine stated in Gale on Easements, 191 et seq., 2d ed. [Lord CAMPBELL, C. J.—A very excellent book.] It is said in Luttrell's Case, 4 Rep. 86 b: "If there be lord and tenant, and the tenant holds to cover and repair the lord's hall, as in 10 E. 3, 23, in this case if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it; but if it is of greater length or breadth so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cowhouse, stable, kitchen, or the like, he is not bound to cover it, for the lord by his act cannot alter the nature of the tenure, nor of the service which the tenant ought to do." The same principle applies here, though the excess is not capable of being so exactly measured. In Perkins's Profitable Book, 128, 15th ed., sect. 671, it is said: "If a man be seised of the manor of Dale in fee, and another man holds of him as of his manor of Dale, to cover the hall, or other house of the manor; if the house fall and be not re-edified by the space of seven years, or for a greater or less time, now for this time the tenant who held by such service is discharged thereof: but when *such house is re-edified, the tenant is bound to do the service, [*125 except it be rebuilt longer or larger, so as it shall be more chargeable to the tenant to cover the house, than it was at the time the tenure was created: and if the house be in such manner re-edified, *quære*, if the tenant shall be bound to cover so much thereof as shall amount to the length and breadth of which it was when the tenure was created," &c. And in a note by the editor it is added: "From what is laid down in Luttrell's Case, 4 Rep. 86 a, Bruerton's Case, 6 Rep. 1 a, and Talbot's Case, 8 Rep. 104 b, it follows that this service, being entire and for the private benefit of the lord, shall not be apportioned by his act; and therefore that the tenant is not bound to perform it in part." The lord, by trying to increase the service, incurs the penalty of losing it. This subject is also discussed in Gale on Easements, 373, 4, 5, where the author says: "It is admitted by the Court of King's Bench, in the case of Garritt v. Sharp, 3 A. & E. 325 (E. C. L. R. vol. 30), that 'the mode of enjoying an easement might be so changed as to defeat the right altogether;' and it would seem, on principle, that this consequence should ensue, at all events to the above extent, wherever a material injury is caused to the owner of the servient tenement

by the alteration, and the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed. If such increased enjoyment would clearly narrow the servient owner's original right of building or otherwise acting on his own property, his tenure is damnified; for though, in strictness of law, he may still build, provided he do not injure the original easement, he can now do so only under the *126] condition of *being subject to the opinion of a jury, on a question so nice as that, whether the building in question, clearly injurious as it would be to the usurped right, be or be not so to the original right." It is further observed that, all easements being a restriction on the natural right of property, in a contest between the owners of dominant and servient tenements "the liberty of the latter is more favourably regarded" "than the attempts of the former to limit it;" and therefore, even supposing an action to lie at his instance after he has changed the mode of enjoyment, he must show, in order to succeed, "that the obstruction to the usurped was clearly an interference with such original right; and also, if this were made out, it should seem, he should further show that the usurped portion was capable of being obstructed without disturbing the original easement." The right to have air and light admitted to a building is acquired and kept alive by enjoyment; if the enjoyment be voluntarily discontinued, it is a question upon evidence whether or not the right has been abandoned: *Moore v. Rawson*, 8 B. & C. 382 (E. C. L. R. vol. 10). As *Littledale, J.*, observed in that case, less than a twenty years' disuse will show such an abandonment. "If" (his Lordship said) "a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does anything to show that he did not mean to convert the land to a different purpose, then his right would *127] not cease." If the *windows do not occupy the same space, the presumption of abandonment is not repelled. That the right of enjoying this kind of easement, being deduced from the acquiescence of the adjoining owner, must be commensurate with it, was pointed out by *Patteson, J.*, delivering the judgment of the Court, in *Blanchard v. Bridges*, 4 A. & E. 191 (E. C. L. R. vol. 31). "The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given." "If it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence." In *Martin*

v. Goble, 1 Camp. 320, the precise question now before the Court was not raised; but the effect of the decision is, that the occupier of the dominant tenement is not entitled to do any act which imposes an additional restriction on the servient tenement. In *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69, the character of the alteration did not clearly appear; so that it was not shown whether it was impossible, as in the present case, for the defendant to obstruct those parts of the windows which had been recently added without also obstructing the ancient lights. The decision there, however, is inconsistent with the doctrine laid down in later cases, and in *Gale on Easements*, 2d ed., 374, 5, where the decision in *Cotterell v. Griffiths* is questioned. **Thomas v. Thomas*, [128 2 Cro. M. & R. 34,† S. C. 5 Tyr. 804, adds nothing in favour of the plaintiff, beyond the authority which attaches to a dictum of Alderson, B., in the course of the argument. It did not appear there that the usurped portion of the easement could not be obstructed without obstructing the original easement: and, further, the jury, as Lord Abinger stated,^(a) had found that there had been an adverse enjoyment for twenty years of the whole easement. Here the plaintiff, by his own act, has made it impossible to separate the usurped and the original parts of the easement; and the defendant is therefore entitled to treat the whole as usurped, according to the rule laid down in 2 Blackst. Comm. 405, and acted upon in *Ward v. Eyre*, 2 Bulstr. 323, and *Lupton v. White*, 15 Ves. 432, 439: and, consequently, as the usurped portion has been enjoyed for only eighteen years, it must be held that the whole easement has not been enjoyed for more; and therefore the question of adverse possession cannot arise. [Lord CAMPBELL, C. J.—If the plaintiff had, since the obstruction, restored the windows to their former condition, would the defendant have had any defence?] Perhaps not, beyond the fact that the defendant's house had been altered before such restoration. [Lord CAMPBELL, C. J.—In Scotland, disputes of this kind are settled by an officer who has some of the functions of a Roman *Ædile*.]

G. Hayes, in reply.—The argument which has now been urged on behalf of the defendant was not raised at the trial. It is only matter of excuse, and does not touch the real issue, which is upon the right to the windows, *as alleged in the declaration. Such a defence [129 should have been pleaded by way of confession and avoidance, the plea stating that the windows had been enlarged, and that it was impossible to obstruct a part without obstructing the whole. But, further, the rule which has been suggested, that where such impossibility exists the whole easement may be obstructed, was not adopted in *Martin v. Goble*, 1 Camp. 320, or *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69, in both of which cases this defence might have been raised. *Hall v. Swift*, 4 New Ca. 381 (E. C. L. R. vol. 33),^(b) is a direct

(a) 5 Tyr. 810.

(b) See *Carr v. Foster*, 3 Q. B. 581 (E. C. L. R. vol. 42).

authority against the doctrine that an alteration of the easement, however slight, destroys it altogether. [Lord CAMPBELL, C. J.—The question whether the alteration is material is for the jury.] The submitting of such questions to a jury must be attended with great difficulty, as was observed in *Blanchard v. Bridges*, 4 A. & E. 176, 191 (E. C. L. R. vol. 31). [Lord CAMPBELL, C. J.—It must be a question for the jury whether the alteration is or is not a mere exercise of the right of easement.] *Cur. adv. vult.*

Lord CAMPBELL, C. J., in this vacation (February 10th), delivered the judgment of the Court.

We are of opinion that this action is not maintainable. But we do not proceed upon the ground that the plaintiff, by the alteration in his windows, had entirely lost the right which he had before enjoyed, of having light and air through such portions of the present windows as formed portions of the ancient windows before the alteration; and we must be understood as not meaning to overturn any of the cases on *130] which the plaintiff's *counsel has relied. But the plaintiff has acquired nothing more in addition to that former right; and, if, by the alterations which he has made, he exceeded the limits of that right, and has put himself into such a position that the excess cannot be obstructed by the defendant in the exercise of his lawful rights on his own land without at the same time obstructing the former right of the plaintiff, he has only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had, at all events until he shall, by himself doing away with the excess and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his buildings as not to interfere with the admitted right.

The material facts proved appear to be, that the plaintiff and defendant have houses on opposite sides of the same court, which is the private property, and in the exclusive occupation, of the plaintiff; that the plaintiff, about eighteen or nineteen years ago, rebuilt his house, the outward wall being on the old foundation; that he raised it a story higher, putting windows into the new story, and altering the dimensions of all the windows in the lower stories, although they still embraced portions of the space occupied by the old windows; that the defendant, in the year 1850, rebuilt his house, and raised it a story, to about the same elevation as the plaintiff's; that thereby he obstructed the new windows in the upper story of the plaintiff's house; that without building a wall similar to the wall of the defendant's new house the defendant could not have prevented the plaintiff from enjoying the free use of the new windows in the upper story of the plaintiff's new house; *131] and that this wall so raised to its present height darkened and *obstructed all the windows in the lower stories of the plaintiff's house.

The defendant clearly had the same right to raise his house in 1850 as he would have had immediately after the plaintiff's house was raised, although he would have had no such right after the plaintiff's new windows in his new story had enjoyed the free access of light and air for twenty years. Would not the defendant have been justified, upon the raising of the plaintiff's house, in raising a wall on his own foundations to obstruct these new windows? Confessedly the defendant could not have maintained any action for placing the windows there whereby his house was overlooked and his privacy was encroached upon; and, after an uninterrupted enjoyment of twenty years, the plaintiff would have had the same easement for these new windows as he had for the old, upon the supposition (it is said) that after such an enjoyment the law would presume a grant from the defendant. But there seems to be no doubt that the defendant, if he did not commit any trespass, was at liberty to interrupt the enjoyment so as to rebut such a presumption. This appears to have been all that the defendant did in the year 1850; and this is the alleged grievance for which the present action is brought. Consequently, the windows in the lower stories of the plaintiff's house are darkened, but the primary cause of this misfortune is the plaintiff's own act in raising his house and opening new windows in it, which had acquired no privilege. Can he thus complain of the natural consequence of his own act? We by no means say that, where the owner of a house alters the dimensions of an ancient window in it, he may in no case maintain an action for that which is an obstruction to the win- [182
dow *in its new state and would have been an obstruction to it
in its former state. This would be contrary to a long series of decisions beginning with *Luttrell's Case*, 4 Rep. 86 a, reported by Lord Coke. If the wall in which the window is be on the extremity of the owner's land, and the window is enlarged at the lower part of it, the owner of the adjoining land could easily obstruct the unprivileged part of the window, and would not be justified in building a wall which would obstruct the whole. But there was no mode of merely obstructing the new and unprivileged windows, and the unprivileged portions of the windows in the lower stories, in this case; and the obstruction of the privileged portions of these windows is a necessary consequence of the obstruction of the unprivileged portions of them and of the new windows in the additional story.

It has been suggested that this defence is not open to the defendant either under the plea of Not guilty or on the plea traversing the alleged right; and that, supposing it to be a good defence, the defendant ought to have confessed and avoided, admitting the obstruction, and excusing or justifying it by reason of the new windows opened by the plaintiff.

The case of *Frankum v. The Earl of Falmouth*, 2 A. & E. 452 (E. C. L. R. vol. 29), established this, that the plea of Not Guilty, under the New Rules, puts in issue only the fact alleged to have been *wrongfully*

done, and not the wrongfulness of that fact; and, though the contention there was that the plea did deny the wrongfulness of the fact complained of, and so incidentally denied the right asserted by the plaintiff, which is not the precise contention made in the present case, yet we are of opinion that the New Rules, and that case, in effect show *183] that the plea of Not Guilty denies only *the fact complained of, and not its nature: and, as, in this case, the obstruction was clearly proved to the existing windows, the issue of Not Guilty must be found for the plaintiff.

As to the plea traversing the plaintiff's alleged right, we have considered much whether the defendant ought not to have pleaded specially that, though some right did exist, yet the plaintiff had committed a great excess in the exercise of that right, and that it was impossible to obstruct the excess without at the same time obstructing the admitted right. But we are of opinion that such plea would after all be no more than an argumentative denial of the alleged right: for, as we have already observed in the outset, the plaintiff has, by his own acts of excess, at all events suspended and lost for the time his former right, if he has not actually and wholly destroyed it.

In holding that the action is not maintainable, we are glad to think that the decision is not likely to lead to any practical injustice or hardship, as it only gives the means of preventing a usurpation ripening into a right; and, when one of two neighbours occupying houses near each other raises his house a story, empowers the other to do the same at any time within twenty years.

We direct the verdict to stand for the plaintiff on the plea of Not Guilty, and to be entered for the defendant on the plea denying the right. Judgment accordingly.

CRAKE v. POWELL. Feb. 10.

Reported, 2 E. & B. 210 (E. C. L. R. vol. 75)

*IN THE EXCHEQUER CHAMBER. [*184

(Error from the Queen's Bench.)

SMITH and Others, Assignees of SHORE and Others, Bankrupts,
v. THORNE and Another, Executors of THOMAS TURNER,
deceased. *Feb. 14.*

T. owed to P. & Co., before their bankruptcy, 275*l.* as surviving partner of T. Y. & Y., and 6565*l.* due independently of that partnership. As part security for the latter debt he had given P. & Co. a mortgage for 5000*l.* Plaintiff, the official assignee of P. & Co., wrote to T.: "By the books of the bankrupts, there is a balance of 275*l.* standing against you;" and requested immediate payment. T. replied: "You have no occasion to blame yourself respecting any claim on me from the estate of P. & Co. The matter has been arranged with the assignees here; and at the last meeting it was arranged that I should pay 450*l.* on the 20th of May, 450*l.* on the 20th of August, 450*l.* on the 20th of November, and 450*l.* on the 20th of February, next; after which I am in hopes that I shall be able to transfer the 5000*l.* mortgage, to enable me to clear off the whole that may be standing against me." It was admitted that the instalments of 450*l.* were to be paid in respect of the debt of 6565*l.*, that the mortgage mentioned in the letter was the mortgage for 5000*l.* given as part security for that debt, that the 275*l.* mentioned by the official assignee was the debt due to P. & Co. from T. as surviving partner of T. Y. & Y., and that T. had paid off the 6565*l.* before the present action was brought against the defendants, his executors.

Held, on error and bill of exceptions, that the Judge was right in directing the jury that the two letters did not amount to a sufficient acknowledgment or promise to take the debt of 275*l.* out of the Statute of Limitations, 21 Jac. 1, c. 17, s. 3, the letters not containing any absolute acknowledgment of a debt, or unqualified promise to pay, only expressing a hope that, on the transfer of the mortgage, T. might be able to clear off the whole that might be standing against him.

ERROR and bill of exceptions. The plaintiffs below, plaintiffs in error, declared in assumpsit, as assignees of Parker, Shore & Co., bankrupts, against the defendants, as executors of Thomas Turner, for money lent to, and paid to the use of, the said T. Turner by Parker, Shore & Co. before their bankruptcy, and on an account stated, &c.: alleging promises to pay on request by Turner and by the defendants in error.

The defendants in error pleaded several pleas, the only material plea being, "that the said several causes *of action in the declaration [*185 mentioned did not, nor did any or either of them, accrue to the said bankrupts, or to the plaintiffs as their assignees as aforesaid, respectively, within six years next before the commencement of this suit." Issue thereon.

On the trial, before Lord Campbell, C. J., at the London sittings after Trinity Term, 1851, it appeared that Turner had been in partnership with two other persons, Yeomans and Yates, under the name of Turner, Yeomans & Yates, up to 1835, when the partnership was dissolved; and that, at the time of the bankruptcy of Parker, Shore & Co., in 1843, 275*l.* 18*s.* 11*d.* was due to them from Turner as the surviving partner. Turner had, before the bankruptcy, again entered into partnership with two other persons, under the name of Turner & Co., and at the time of the bankruptcy was indebted to Parker, Shore &

Co. in a further sum of 6565*l.*, which was secured, up to the amount of 5000*l.*, by a mortgage of certain property of Turner. After the bankruptcy of Parker, Shore & Co., Turner admitted to one of the plaintiffs that he was indebted to the bankrupts in the two sums of 6565*l.* and 275*l.* 18*s.* 11*d.*, and arranged to pay off the former by instalments, and then to pay off the latter. In June, 1844, G. W. Freeman, one of the plaintiffs and official assignee, wrote to Turner as follows :

“43, Mill Hill, Leeds, 25th June, 1844.

Re Parker, Shore & Co.

Gentlemen,

By the books of the above bankrupts, there is a balance of 275*l.* 18*s.* 11*d.*, with interest, standing against you ever since the 16th January, 1843, and I take considerable blame to myself for allowing this debt *136] and interest to remain so long unsettled; and I am now so *situated that I must request you will not fail in calling on Mr. Freeman senior on Monday next, at No. 53, Queen Street, Sheffield, between the hours of 12 and 4 o'clock, and pay the same; and in case of non-compliance I must forthwith have recourse to most stringent measures agreeable to the late Act of parliament to enforce the payment thereof.

I am, Gentlemen, yours, &c.,

G. W. FREEMAN, Official assignee.

To Mr. Thomas Turner, for Turner, Yeomans & Yates.”

On 26th June, 1844, Turner wrote and sent the following answer:

“Sheffield, 26th June, 1844.

Mr. G. W. Freeman. Sir,

In reply to yours of yesterday's date I beg to observe that you have no occasion to blame yourself respecting any claim on me from the estate of Parker, Shore & Co. The matter has been arranged at the different interviews or meetings with the assignees here; and at the last meeting I had with Mr. Freeman, Jun., it was arranged that I should pay 450*l.* on the 20th May, 450*l.* on the 20th August, 450*l.* on the 20th November, and 450*l.* on the 20th February next; after which I am in hopes that I shall be able to transfer the 5000*l.* mortgage, to enable me to clear off the whole that may be standing against me.

I am, Sir, yours very respectfully,

THOMAS TURNER.”

It was admitted that the four sums of 450*l.* each were to be paid on account of the debt of 6565*l.*, that the said mortgage was the mortgage before mentioned as having been given by way of security for such debt, that the sum of 275*l.* 18*s.* 11*d.*, mentioned in the letter of the official *137] *assignee, was the debt due from Turner as surviving partner of the firm of Turner, Yeomans & Yates, and that Turner had paid off the other debt of 6565*l.* before the action was brought. The

Lord Chief Justice directed the jury that the letters of the 25th and 26th June "were not" "a sufficient acknowledgment or promise to take the case out of the operation of the Statute of Limitations, or to support a cause of action within six years before the commencement of the action as to the said debt of 275*l.* 18*s.* 11*d.*," "the said letters not containing any absolute acknowledgment of a debt, or promise to pay, but only expressing a hope that on the transfer of the mortgage the said Thomas Turner might be able to clear off the whole that might be standing against the said Thomas Turner." The jury found a verdict for the defendants on the issue in question, the plaintiff's counsel having previously tendered a bill of exceptions to the ruling of the Lord Chief Justice, insisting "that the said letter of the 26th June was, under the circumstances, and taken in connexion with the said letter of the 25th June, a sufficient acknowledgment to take the said case out of the operation of the Statute of Limitations, and to support a cause of action within six years before the commencement of the action, as to the said debt of 275*l.* 18*s.* 11*d.*"

Honyman, for the plaintiffs.—The two letters, taken together, form a sufficient acknowledgment of the debt, within stat. 9 G. 4, c. 14, s. 1, to take it out of the operation of stat. 21 Jac. 1, c. 16, s. 3. The intention of stat. 9 G. 4, c. 14, s. 1, as to the particular legal effect of such an acknowledgment was much discussed at first; but it is now established that it should be taken as "affording evidence of a new promise, [*138 just as, before the statute, an acknowledgment not in writing was allowed as evidence to the same effect; *Hurst v. Parker*, 1 B. & Ald. 92, *Tanner v. Smart*, 6 B. & C. 608 (E. C. L. R. vol. 18). The letters in question, therefore, though they may not contain an absolute and unconditional promise, were, taken together, sufficient evidence of a promise to allow of the jury finding a verdict for the plaintiffs. In *Ricke v. Nokes*, 1 Moo. & Rob. 359, the mere entry of a debt at a bankrupt's examination was held to create a sufficient acknowledgment of the debt by the bankrupt to take it out of the Statute of Limitations. *Smith v. Poole*, 12 Sim. 17, is to the same effect. [WILLIAMS, J.—Stat. 9 G. 4, c. 14, does not alter the law as to the effect of an acknowledgment of a debt; it alters only the manner in which the acknowledgment must be proved.] That is so. But, wherever an acknowledgment has been held insufficient, it has been either because the acknowledgment was not in itself a sufficient admission, or because it was coupled with some expressions which rebutted the evidence of an unconditional promise to pay. Here there are no such expressions: there is an acknowledgment of the debt, followed by an expression of hope that it will be soon settled. There is not, as in *Tanner v. Smart*, a promise by the debtor to pay the debt when he is able; if that had been the form of expression, no doubt the ability to pay should have been proved, according to the decision in that case. But here there is nothing to raise a presump-

tion of inability. [PARKE, B.—Suppose he had said “I will pay after a long time.” That would not be a sufficient acknowledgment.] That
 *139] would certainly not support the averment in the *declaration of a promise to pay on request. But, if he had said “I fear I may not be able to pay for a long time,” the acknowledgment would be sufficient; for a mere expression of fear, or, as in the present case, of hope, with respect to the time of payment, does not show inability to pay at once. It was admitted at the trial that the debt for which the mortgage, which Turner proposes to transfer, was given as security, had been paid off. But to hold that the acknowledgment must be consistent with an intention to pay immediately is contrary to the decision in *Eicke v. Nokes*. *Dabbs v. Humphries*, 10 Bing. 446 (E. C. L. R. vol. 25), and *Bird v. Gammon*, 3 New Ca. 883 (E. C. L. R. vol. 32), are also in favour of the plaintiffs. [PARKE, B.—The acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some condition which has been fulfilled.] If the transfer of the mortgage is to be regarded as a condition precedent to payment in the present case, it is a condition which has not been fulfilled. But the statement in the letter as to the transfer is nothing more than an expression of a hope for a particular mode of payment, added to an unqualified acknowledgment of the debt. [WILLIAMS, J.—Vice-Chancellor Wigram, in *Philips v. Philips*, 3 Hare, 281, 299, states very clearly how the law stands as to acknowledgments of this kind. He says: “It is not strictly accurate to say, that the effect of acknowledging a debt barred by the Statute of Limitations is to revive it for all purposes.” “The new promise, and not the old debt, is the measure of the creditor’s right.” “If the debtor promises to pay the old debt when he is able, or by instalments, or in two years, *or out of a particular fund, the creditor can claim nothing more than the promise gives him.”] *Dodson v. Mackey*, 8 A. & E. 225 (E. C. L. R. vol. 35), is an authority to show that the admission of the debt in the defendant’s letter is a sufficient acknowledgment to create a promise of payment, and that the effect of such acknowledgment is not qualified by the subsequent statement of his expectations as regards the time and mode of payment. *Humphreys v. Jones*, 14 M. & W. 1,† and *Gardner v. M’Mahon*, 3 Q. B. 561 (E. C. L. R. vol. 43), are also in point. In *Barrett v. Birmingham*, 1 Flan. & K. (Rolls, Ireland), 556, a return of a judgment debt made by an insolvent in his schedule was held to be a sufficient acknowledgment of the debt to take it out of the operation of stat. 3 & 4 W. 4, c. 27, s. 40. [PARKE, B.—In *Kennet v. Milbank*, 8 Bing. 38 (E. C. L. R. vol. 21), which turned upon stat. 9 G. 4, c. 14, the mere recital of a debt in a deed of composition with creditors, the amount not being mentioned, was held to be no sufficient acknowledgment. In *Bird v. Gammon*, however,

the Court held that I was right in considering the mention of the amount not material.] At any rate there was sufficient evidence here to allow of the jury finding that Turner had promised to pay the debt. [PARKE, B.—That is not a question for the jury. The later cases have decided that the effect of the document set up as an acknowledgment is entirely a question for the Court, unless extrinsic evidence is necessary to qualify or explain it.]

Tomlinson, contra.—*Hart v. Prendergast*, 14 M. & W. 741,† is a strong authority to show that the acknowledgment here *amounts, at the most, only to a qualified promise to pay at a time which has [*141 not elapsed, and therefore does not support the promise, alleged in the declaration, to pay on request. [PARKE, B.—We are all of opinion that the letters do not, by themselves, amount to a sufficient acknowledgment; but we are not at present agreed as to the validity of the reason given by the Lord Chief Justice for his ruling; namely, that they only express a hope that Turner may be able to pay off the whole debt. It may be questioned whether they do not, under all the circumstances, amount to a promise of some kind; but you are bound to support the ruling on the ground given by the Lord Chief Justice, and on that alone. You must satisfy us that they express nothing more than a hope of payment.] The ruling must be read with the bill of exceptions, which explains it. The bill states that the counsel for the plaintiffs required the Lord Chief Justice to direct that the letters were, “under the circumstances,” a sufficient acknowledgment. That expression means only the circumstances which are set out in the bill. If counsel for the plaintiffs had, in the bill, set out and insisted upon other evidence tending to convert the mere expression of hope into an absolute promise to pay, the ground of the ruling might have been objected to; but, as the bill of exceptions now stands, the ground was correct. An acknowledgment, to be within the meaning of stat. 9 G. 4, c. 14, must be absolute and unqualified, either on the face of it, or by proof of the occurrence of the particular event, or the performance of the particular condition, by which it is qualified. Here no such proof was insisted upon in the bill of exceptions; and the ruling was therefore right.

**Honyman*, in reply.—The argument that the ruling of the Lord Chief Justice may be explained by the bill of exceptions [*142 cannot be supported. The question whether any, and what, evidence is to be mentioned in the bill of exceptions, in support of the objections there taken, depends upon the ruling itself. The Lord Chief Justice directed the jury that the letters expressed nothing more than a hope of payment; the plaintiffs' counsel, therefore, could not insist upon the effect of evidence which would be available only where there already existed a conditional promise. In *Hart v. Prendergast*, 14 M. & W. 741,† there was no promise at all; here there is a promise, followed by an

expression of hope as to the time of payment, which does not at all qualify the effect of the absolute promise which precedes it.

PARKE, B.—We are all of opinion that the direction of the Lord Chief Justice was right, on the ground given by him. It is not, therefore, necessary to inquire whether, if we had differed as to the correctness of that ground, the ruling could have been supported. The Lord Chief Justice told the jury that the letters were not a sufficient acknowledgment or promise to take the debt out of the Statute of Limitations, or to support a cause of action for it within six years before the commencement of the action. This was expressly excepted to. The ground given by the Lord Chief Justice for his ruling was that the letters expressed “only a hope that on the transfer of the mortgage” Turner “might be able to clear off the whole that might be standing against” him. We need not now consider whether, if this construction of the *143] letters were incorrect, and they had *amounted to a conditional promise, they might, if the effect of other evidence had been insisted on in the bill of exceptions, have been held to amount, under all the circumstances, to a sufficient acknowledgment within the meaning of stat. 9 G. 4, c. 14. There has been no question, since *Tanner v. Smart*, 6 B. & C. 608 (E. C. L. R. vol. 13), that an acknowledgment of a debt must, in order to take it out of the operation of the Statute of Limitations, be sufficient to support the promise laid in the declaration, namely, to pay on request. By stat. 9 G. 4, c. 14, that acknowledgment must now be in writing; but it must still support a promise to pay on request, either by showing, on the face of it, an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of the event, by which the promise is qualified. No doubt a mere acknowledgment of the existence of the debt (as, for instance, an I. O. U.), if unaccompanied by any expressions which control its effect, is sufficient to support an unconditional promise to pay. But in the present case there is no such acknowledgment. In the letter of the 26th June, Turner speaks of certain claims against him on account, not mentioning the amount or specifying the items. Whether that letter related at all to the debt of 275*l.* 18*s.* 11*d.* was a question for the jury. Assuming that it did, the construction of the letter was for the judge; and the Lord Chief Justice was, we think, right in holding that it did not, even when coupled with the letter of the 25th June, amount to any distinct acknowledgment of the debt, or promise to pay it, but only to a hope that, at some future time, and by the transfer of the mortgage, *144] *Turner might be able to clear off what might be standing against him. We all agree that this cannot, under any reasonable construction, be considered as a positive engagement to pay on the part of Turner, and that the direction of the Lord Chief Justice was right. The judgment, therefore, must be affirmed.

CRESSWELL, TALFOURD, and WILLIAMS, Js., and PLATT and MARTIN, Ba., concurred. Judgment affirmed.

That a promise or admission to take a case out of the statute of limitations must be positive, absolute, and unqualified, is now the settled doctrine of the Courts in this country as in England. It is necessary to refer to a few only of the late leading cases on this subject: *Farley v. Kustenbader*, 3 Barr, 418; *Cocks v. Weeks*, 7 Hill, 45; *Manning v. Wheeler*, 13 N. Hamp. 486; *Robbins v. Farley*, 2 Strobhart, 848; *Westbrook v. Beverly*, 11 Smedes & Marshall, 419; *Martin v. Broach*, 6 Georgia, 21; *Ventris v. Shaw*, 14 N. Hamp. 422; *Kensington Bank v. Patton*, 14 Penna. State Rep. 479; *Arey v. Stephenson*, 11 Iredell, 86; *Sherman v. Wakeman*, 11 Barb. Sup. Ct. 254; *Boxley v. Gayle*, 14 Alabama, 151; *Bryan v. Ware*, 20 Alabama, 687; *Grant v. Ashley*, 7 English, 762; *Poole v. Relfe*, 23 Alabama, 706; *Harbold v. Kuntz*, 16 Penna. State Rep. 210.

The QUEEN v. The GREAT WESTERN Railway Company.
(The GREAT WESTERN Railway Company v. TILEHURST.)

Reported, 15 Q. B. 1085 (E. C. L. R. vol. 69).
(Judgment, Tuesday, February 10th.)

The Master, Pilots, and Seamen of the Town of NEWCASTLE UPON TYNE in the County of NEWCASTLE UPON TYNE v. BRADLEY and POTTS. Feb. 21.

Reported, 2 E. & B. 428, note (a) (E. C. L. R. vol. 75).

*SHEPHERD v. The Marquis of LONDONDERRY and Another. Feb. 8. [*145]

The Tithe Commissioners have no power, under stat. 6 & 7 W. 4, c. 71, ss. 45, 50, to determine a suit pending between two rival claimants of tithes; inasmuch as the words "touching the right to any tithes," in sect. 45, refer only to suits which raise questions as to the titheability of particular lands, not to those which bring into question the right of particular parties to tithes of which the existence is admitted: And, further, because a suit raising only a question of title between two claimants of tithes is not a "difference" "whereby the making" of the award by the Commissioners is "hindered," within the meaning of sect. 45.

REPLEVIN, for cattle distrained upon a certain close of the plaintiff, and detained, &c.

Avowry: that the said close, at the time when, &c., was chargeable with the payment of a certain yearly rent-charge, under the Tithe Commutation Acts: that a certain amount of the said rent-charge had then been in arrear for more than twenty-one days, and after ten days' notice, &c.: and, because the defendant the Marquis of Londonderry was entitled to the said amount, the said defendant, and the other defendant as his bailiff, well acknowledge the said taking of the said cattle, &c., as a distress for the said amount of rent-charge, &c.

Plea 1. That the said close was not chargeable with the payment of the alleged yearly rent-charge, in manner and form, &c. Issue thereon.

Plea 2. That the said Marquis was not the person entitled to the said rent-charge or to any part thereof, in manner and form, &c.: Issue thereon.

The action was brought by direction of the Court of Chancery, for the purpose of determining the question of the Marquis of Londonderry's right to tithes in respect of certain land in the parish of St. Giles, Durham, of which he claimed to be the impropriate rector, and part of which had been enclosed under a private Act in 1816. In 1829 the Marquis had filed a bill in equity against the owners of certain *146] burgage tenements in the said *parish, to whom the land enclosed had been allotted, for an account in respect of tithes due from them as such occupiers. The answers to the bill set forth that the Marquis was not entitled to the said tithes as impropriate rector, inasmuch as the tithes arising from one portion of the said parish belonged to the curate, and those arising from the remaining portion had been granted away, more than 200 years ago, by the then owners of the impropriate rectory, to the respective owners of the land within that portion, including the then proprietors of the said burgage tenements, and now belonged to the present proprietors: and that there had not been, at all events for many years, any glebe land belonging to the rectory of the said parish, or anything to constitute an impropriate rectory.

While this suit was pending, the Assistant Tithe Commissioner, acting under the Tithe Commutation Act, 6 & 7 W. 4, c. 71, made his award, apportioning the amount of rent-charge payable in respect of the lands in question. At the time of making the award, he had notice that the suit was pending, and was required to enter upon and determine the question raised by it; but he declined to do so.

On the trial of the present action, before Williams, J., at the Durham Summer Assizes, 1851, it was objected, on behalf of the plaintiff, that, under stat. 6 & 7 W. 4, c. 71, ss. 45, 50, the Commissioner was bound to determine the suit before making his award; and that the award was consequently invalid, and the close not legally chargeable with the rent-charge. The jury found that the Marquis was the im-

propriate rector of the parish; that the land in question was titheable; and that the defendant was entitled to the tithe arising from that land; and a verdict was found for the defendants, leave *being reserved [*147 to move to enter the verdict for the plaintiff.

Knowles, in last Michaelmas term, obtained a rule nisi accordingly.

Watson (with whom was *Manisty*) now(a) showed cause.—The Commissioner had authority to make the award. Stat. 6 & 7 W. 4, c. 71, s. 45, enacts that, “if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability under any circumstances to the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the Commissioners or Assistant Commissioner shall be hindered, it shall be lawful for them to appoint a time and place for determining the same, and their decision is to be “final and conclusive:” and sect. 50 enacts that, “as soon as all such suits and differences shall have been decided,” the Commissioners shall frame the draft of their award, declaring the amount of rent-charge. The plaintiff contends that, under these sections, the Commissioner had no power to make the award upon which the defendant relies, until the question of title raised by the suit pending in Chancery had been determined, and that such question must be determined by the Commissioner. But, first, the suit is not a suit “touching the right to any tithes.” These words mean, not questions of right to tithes as between individuals, but *questions as to the titheability of particular lands. The suit in question is brought [*148 by the present defendant for an account; the parties against whom the suit is brought admit the titheability of the land in question; but they assert that the defendant is not, and that other persons are, the owners of the tithes. [PATTERSON, J.—The words “as to the existence of any modus,” &c., seem to cover all questions of titheability: if so, the preceding words “touching the right to any tithes” must mean something else.] The latter part of the description only extends and explains the meaning of the former. Sect. 9 of stat. 5 & 6 Vict. c. 54, which is in pari materia, gives the Commissioners power, “in all cases, whether the tithes of any parish have been commuted or not, where any question as to the liability of any lands to the render of tithes, or as to the existence of any modus,” &c. (following the language of stat. 6 & 7 W. 4, c. 71, s. 45), “shall have been heard and determined by the said Commissioners,” “to make an award” “for the determination of all questions of arrears of tithes claimed in any suit which may be pending in any court of equity for the purpose of trying, as to the same

(a) The arguments were completed on this day; the judgments were delivered on the 9th February following.

lands, such liability," &c. From this it is clear that the words "touching the right to any tithes," in stat. 6 & 7 W. 4, c. 71, s. 45, mean touching the liability of any lands to the render of tithes. [COLERIDGE, J.—According to your construction, the word "suit," in sect. 45, does not refer at all to a suit in equity.] A suit in equity in respect of tithes is, properly, always a suit for an account. The Court of Chancery cannot, strictly speaking, decide the question of title to tithes. It can only decree an account, when the title has been determined by another *149] tribunal. [WIGHTMAN, J.—A suit for an account may often, *practically, raise a question of title. COLERIDGE, J.—The use of the word "suit," in sect. 45, seems as if intended to cover something more than the mere questions of titheability which are enumerated afterwards.] Its meaning is explained by stat. 5 & 6 Vict. c. 54, s. 9. [WIGHTMAN, J.—Where the Commissioner, under sect. 27 of the former Act, confirms a parochial agreement made under sect. 21, which sets out "in what right" each "tithe owner is entitled to" the tithes, is he not, in fact, determining a question of title?] *Regina v. Tithe Commissioners*, 15 Q. B. 620 (E. C. L. R. vol. 69), decides that he is not. "Tithe owner," in sect. 21, means, as sect. 12 shows, merely the person "in actual possession" of the tithes; and therefore the confirmation of the parochial agreement would not necessarily determine a question of title between two rival claimants.

Next, the suit in question is not a suit "whereby the making" of the award is "hindered;" and it must have that effect, in order to come within the provisions of sect. 45; *Girdlestone v. Stanley*, 8 Y. & C. 421.† The purpose of the award is to determine the amount of rent-charge; and that question is not affected by the question to whom rent-charge is payable; *Regina v. Tithe Commissioners*.

Moreover, the decision of the Commissioners is, by sect. 45, to be "final and conclusive on all persons." But their decision upon a question of title to tithes between two rival claimants could not be conclusive; for, by sect. 71, "any person having any interest in or claim to any tithes, or to any charge or encumbrance upon any tithes," before the passing of the Act, is to have "the same right to or claim upon the rent-charge for which the same shall be commuted," as he had to or *150] upon the "tithes, and "the like remedies for recovering the same as if his right or claim" "had accrued after the commutation." It is clear, therefore, that any question to title of tithes could be tried before the ordinary tribunals after the award was made.

Lastly, the award in the present case has been duly confirmed, and is, therefore, by sects. 52, 66, "binding on all persons interested in the said lands or tithes," and cannot now "be impeached" "by reason of any mistake or informality therein or in any proceeding relating thereto."

(*Manisty* was stopped by the Court.)

Knowles, Atherton, and T. Jones, contra.—The suit in question does, practically, involve a question of titheability. The defendants there deny the right of the plaintiff to tithes, on the ground that the land in question had, before enclosure, been separated from the impropriate rectory; that is, on the ground that there is no tithe arising to him out of that land. [COLERIDGE, J.—No; on the ground that the tithe arising from that land belongs to some one else.] The answers to the bill raise the question whether tithe arises to any one out of that land; for the defendants state that for many years no tithe has been paid, and that it cannot be shown that it ever has been paid. It has been urged that this suit is not one “whereby the making” of the award is “hindered.” But those words refer only to the words “any difference,” which immediately precede them, and not to the various questions and claims before enumerated, of which the suit “touching the right to any tithes” is one. *Re Crosby Tithes*, 13 Q. B. 761 (E. C. L. R. vol. 66), is an authority to show that *the Commissioner has power to determine a suit of this nature; and that it comes [*151 within the description, in sect. 45, of a suit “touching the right to any tithes.” [PATTESON, J.—In that case the question raised by the suit was whether tithe was payable at all.] It can hardly be said that that was the only question raised: the suit also involved the question whether, if tithe was payable at all, it was payable to the vicar or to the rector. [PATTESON, J.—You are, in fact, contending that *Regina v. Tithe Commissioners*, 15 Q. B. 620 (E. C. L. R. vol. 69), ought to be overruled.] In that case there was no “suit” “pending;” and the judgment proceeded expressly upon the ground that the question was not “a difference” “whereby the making” of the award was “hindered.” *Wetherell v. Weighill*, 3 Y. & C. 243,† also decides that the Commissioners have power to determine a suit of this kind, although such power is discretionary. [WIGHTMAN, J.—If you contend that a suit pending between two rival claimants of tithes is a suit “touching the right to any tithes,” within the meaning of sect. 45, how do you explain the language of sect. 71?] That section applies only to questions connected with the right to tithes in which there has been no suit brought, and no decision by the Commissioner. The language of sect. 45 is too plain to be controlled by mere inference from the language of other sections. (They also referred to stat. 2 & 3 Ed. 6, c. 13, ss. 5, 6.)

PATTESON, J.—The defendant in this action, who is the impropriate rector of the parish of St. Giles, Durham, distrained upon the close of the plaintiff, one of the *parishioners, for arrears of rent-charge [*152 due from him according to the apportionment made by the assistant Commissioner under the Tithe Commutation Act, 6 & 7 W. 4, c. 71. Certain lands in the parish had been enclosed and allotted in 1816: and, at the time when the award of the Commissioner was made, a suit in Chancery was pending, instituted by the present defendant against the

owners of certain burgage tenements, including the plaintiff, for an account of tithes due from them, as such owners, to the defendant, in respect of the land allotted to them. Notice of the suit was given to the Commissioner; but he made no inquiry as to the title of the present defendant, although he practically decided that the land was not exempt from tithes. It appears, by the proceedings in equity, that there were some burgage tenements in the parish which were exempt, according to the defendants in the suit, from payment of tithes, the former improper rector having conveyed away the tithes to the owners of those burgage tenements, who were therefore at the same time the owners of the tithes. The suit, therefore, raised a question of title between the improper rector and the owners of those burgage tenements. It was contended that this was a "suit" "pending touching the right to any tithes," within the meaning of stat. 6 & 7 W. 4, c. 71, s. 45, and that therefore the Commissioner was bound to determine it before making his award. Now, if the words "touching the right to any tithes" mean "touching the title to any tithes as between rival claimants," the suit in question would be one which the Commissioner has the power to determine: but, if we couple them with the words which follow shortly after, "whereby the making" of the award "shall be hindered," it is

*153] *clear, as we decided in *Regina v. Tithe Commissioners*, 15 Q. B. 620 (E. C. L. R. vol. 69), that they cannot refer to a question of title of that kind, because such a question does not hinder the making of the award, which is merely for the purpose of determining the amount of the rent-charge payable, and not the particular person to whom it is payable. It has been said that in the case of *Regina v. Tithe Commissioners* there was not a suit pending, but only a "difference," to which alone the words "whereby the making" of the award "shall be hindered" apply. But I think that the words "whereby the making" of the award "shall be hindered" refer, not only to the words "any difference," but to all the questions and claims mentioned in the previous part of the section. It is, therefore, unnecessary for us to express an opinion as to whether the Commissioner has, in some cases, power to determine a Chancery suit: and we expressly guarded ourselves against expressing an opinion on this point in *Regina v. Tithe Commissioners*. It is clear that he has not power to do so unless the suit hinders the making of his award. This construction of sect. 45 is confirmed by sect. 71, which provides that any person shall have the same right to or claim upon the rent-charge as he had upon the tithes before the statute passed, and the like remedies for recovering the same as if his right or claim had accrued after the commutation. The making of the award, therefore, would do no mischief to either party as regards questions of title to tithes, which, by sect. 71, can be litigated in the same manner after the award as they could have been before. None of the cases cited are exactly in point either way; but

the principle *involved in all of them is against the plaintiff. The present question is simply one of title between two rival claimants of tithes, and therefore one which the Commissioner had no power to determine. For these reasons I am of opinion that this rule ought to be discharged. [*154]

COLERIDGE, J.—I am of the same opinion. The question turns entirely upon the language of sect. 45. It has been contended that the words “touching the right to any tithes” refer to questions touching the right of one of two rival claimants to tithes of which the existence is undisputed, and not to questions as to the right of any one at all to tithes out of the particular lands. It is almost an absurdity, however, to suppose that the statute would give the Commissioners the power to determine a suit of this limited character, and yet make no provision for their determining suits involving the general question of titheability. But, if it be held that the language of the section is meant to include both kinds of suit, then it is clear that the former kind is one which, according to a recent decision of this Court, to which we still adhere, does not “hinder” “the making” of the award, and therefore is not one which the Commissioner has power to determine. If it were, moreover, the provisions of sect. 71 would be useless. Another argument is this. Sect. 45 is a very strong enactment, taking away from the ordinary tribunals a large number of questions, and bringing them before Commissioners, who, however able and learned, are necessarily without that assistance which a properly constituted Court would have: and the meaning of the section, therefore, ought not to be strained beyond its necessary and obvious intention. We should be doing so, if we included within its *provisions suits which do not hinder the making of the award. That it was not the intention of the statute to include [*155] these is also clear from the language of the whole section; for all the other questions there specified, as within the power of the Commissioners to determine, are questions which would hinder the making of the award.

WIGHTMAN, J.—The question in the present case is, whether the Tithe Commissioner could make a valid award while this suit in equity was pending. That depends upon whether it was a “suit” “pending touching the right to any tithes,” within the meaning of stat. 6 & 7 W. 4, c. 71, s. 45. I confess that I was at first struck with the effect of that section, taken together with sects. 21, 50. Sect. 50 provides that the draft award by the Commissioner “shall contain all the particulars” “required to be inserted in any parochial agreement.” Sect. 21 enacts that every parochial agreement shall distinguish “in what right every” “tithe owner is entitled to” “tithes.” If the question depended solely upon these sections, I should have doubted whether, the words “touching the right to any tithes” being so general, the Commissioner could have made a valid award before he had determined this suit. But,

upon examination, the suit turns out to be, not a suit touching the right to any tithes, but a suit between two rival claimants of tithes, the existence of the tithes not being called in question. To hold that such a suit comes within the meaning of sect. 45 would be to hold that the provisions of sect. 71 are perfectly nugatory. Under the latter section the rival parties might still try their title to the rent-charge, after the *156] award had been *made; so that the decision of the Commissioner could not be, as sect. 45 declares that all his decisions upon the questions there enumerated shall be, "final and conclusive."

ERLE, J., concurred.

Rule discharged.(a)

(a) Reported by Francis ERLE, Esq.

The QUEEN, on the prosecution of the Marquis of BRISTOL and Others v. The TITHE COMMISSIONERS for ENGLAND and WALES. Feb. 21.

(Re HALE Tithes.)

Mandamus, directed to the Tithe Commissioners, alleged that they had proceeded to effect a commutation of the tithes of the parish of H.; and that, during the proceedings, certain differences, whereby the making of their award was hindered, arose between landowners in the parish and the vicar, viz., whether certain old enclosed lands were exempt from the render of great tithes in kind, and of tithes of wool and lamb in kind, or, if not so exempt, whether they were subject only to the payment of 1s. per acre yearly, in lieu of the said tithes, to the impropiator; and whether certain new enclosed lands were wholly exempt from the render of great tithes in kind, and of tithes of wool and lamb in kind. The writ commanded the Commissioners to hear and determine the said differences.

Return: That at a former meeting of the Commissioners, for the purpose of awarding the amount of rent-charge payable by a township of the said parish, the vicar claimed the tithes of lamb and wool, the impropriate rector protesting against such claim, and the landowners contending that by an agreement, confirmed by a decree in Chancery in 1699, all the tithes of the parish had been commuted. That at a subsequent meeting, the Commissioners having given notice that it would be held for the hearing and determining certain differences whereby the making of their award was alleged to be hindered, the vicar proposed that his title to the tithes of wool and lamb should be tried by a feigned issue, the Commissioners first awarding the amount of rent-charge to be paid in lieu of them to the party entitled; that the landowners insisted that the tithes of lamb and wool had been extinguished by agreement and by decree in Chancery, and that a difference existed between the landowners, vicar, and impropiator concerning the said tithes; and they called upon the Commissioners to determine the question. That it was then arranged that, if the parties would not consent to try as above, the landowners might apply for a mandamus to the Commissioners to try the question whether the said tithes belonged to the vicar or to the landowners as impropiators of the tithes of their respective lands. The return also stated that the said question, raised at the last-mentioned meeting, was one of title. It then set out a bill in Chancery, filed in 1812 by the then vicar against certain landowners, for subtraction of tithes, in which the question was raised whether the lands of the parish were ever liable to pay tithes of lamb and wool to the vicar; and also a decree in the said suit, in 1817 (by which it appeared that the defendants therein contended that by an agreement, confirmed by decree of Chancery in 1699, part of certain enclosed lands was allotted to the vicar in lieu of all tithes arising to him from the said lands,(a) and by a further agreement, in 1707, the landowners agreed to pay the vicar 1½d. per acre in lieu of all small tithes throughout the parish), which decree of 1817 ordered the master to take account of the tithes of wool and lamb, as due to the vicar, dismissing his bill as to tithes of hay. The return then stated a bill in Chancery, filed in 1819, by the impropriate rector against the vicar, claiming the tithes of wool and lamb, which bill was dismissed with costs.

(a) See p. 156, note (a).

It then stated peremption of the tithes by the vicar; and that the Commissioners, considering that the said decrees established the right of the vicar to tithes of lamb and wool, declined to comply with a requisition of the landowners, calling on them to confirm the agreements of 1699 and 1707, under stat. 5 & 6 Viet. c. 54, s. 7, and refused to decide the question of title. That, in 1845, the said landowners obtained a mandamus to confirm the agreements and decide the differences pending, and that, on return made, and demurrer, judgment was given for the Commissioners. That the assistant Commissioner, in 1850, made his award, which, after a fortnight's notice to the landowners, to give them an opportunity of advancing any further claim, was confirmed; and which awarded that all titheable lands in the parish were subject to payment of all tithes in kind, that certain persons therein named were impropriators respectively of the great tithes in the parish, and that the vicar for the time being was in possession of the tithes of wool and lamb, and entitled to the residue of the tithes; and awarded certain rent-charges, in lieu of tithes, to the impropriators, and to the vicar "or to the party lawfully entitled," in lieu of tithes of wool and lamb, and of the said residue of tithes.

Held, on demurrer to this return, that, upon the whole record, the question raised was purely a question of title between the impropriator and the vicar, and that no difference existed between the landowners and the vicar which hindered the making of the award and which the Commissioners were therefore bound to hear and determine.

Quare, whether the writ was not bad, as raising, on the face of it, a question of title.

MANDAMUS. The writ charged that the Tithe Commissioners duly proceeded, under stat. 6 & 7 *W. 4, c. 71, to effect a commutation of the tithes of the parish of Great Hale, in the county of [*157 Lincoln, and that, during the said proceedings, divers differences arose whereby the making of their award according to the said Act was hindered, whereof they had notice; that is to say, a certain difference between the owners of certain lands in the said parish, called and known as the old enclosed lands, and the Rev. R. Bingham, then being vicar of the said parish; the said landowners claiming and insisting that the said old enclosed lands were wholly exempted from the render of all great tithes in kind, and of all tithes of wool and lamb in kind, or, if not so exempted, that they were subject only to the payment of 1s. per acre yearly, to wit, to the impropriator of the said parish, for and in lieu of the same tithes; (a) and a certain other difference, between the owners of certain other lands in the said parish, called the new enclosed lands, and the said vicar; the last *mentioned landowners claim- [*158 ing, &c., that the said new enclosed lands were wholly exempted or discharged from the render of all great tithes in kind, and tithes of wool and lamb in kind: which several claims the vicar then denied. The writ commanded the Commissioners to hear and determine the said differences.

The return alleged that, on 24th March, 1848, the Tithe Commissioners issued a notice that, on 24th April next, they would proceed to ascertain and award the sum to be paid by way of rent-charge instead of the tithes of the township of Great Hale in the parish of Great Hale. That the meeting was held on 24th April, before an assistant Commissioner, at which the agents for the several parties concerned attended; and that the agent of Sir George Farrant, the impropriate rector, then protested against the vicar's claim to the tithes of lamb and wool; and the agent for the landowners of the parish then con-

(a) See p. 166, note (a).

tended that, under and by virtue of a decree of the Court of Chancery, dated 1699, all the tithes of the parish had been commuted; and the agent of the vicar then contended that the vicar was entitled to the tithes of lamb and wool. That the said meeting was adjourned; and that, on 22d January, 1844, the Tithe Commissioners gave notice that, on 22d February then next, they would proceed to hear and determine certain differences which had arisen, "whereby the making an award for the commutation of the tithes of the said parish of Great Hale was alleged to be hindered and obstructed." That, on 22d February, the meeting was accordingly held before an assistant Tithe Commissioner, when counsel on behalf of the vicar proposed that the title of the vicar to the tithes of wool and lamb should be tried on a feigned issue, and that *159] the Tithe Commissioners should award a rent-charge in lieu of great tithes to the landowners in the said parish, a rent-charge in lieu of the tithes of wool and lamb to the party entitled thereto, and a rent-charge in lieu of the other small tithes to the vicar; and counsel on behalf of the said landowners then claimed and insisted that the said tithes of wool and lamb were extinguished by virtue of a certain agreement and a decree of the Court of Chancery, and that a difference was then existing between the said landowners, vicar, and impropiator, concerning the said tithes of lamb and wool; and the said counsel called upon the assistant Tithe Commissioner to determine whether or not the vicar was entitled to the said tithes of lamb and wool. That counsel for the vicar then claimed the same tithes as belonging to him. That it was agreed that the said parties should have time to consider whether they would not consent to try a feigned issue as to the title to the said tithes of lamb and wool, and that if they did not so consent, the landowners should be at liberty to move the Court of Queen's Bench for a mandamus to compel the Tithe Commissioners to try the question, whether the said tithes belonged to the vicar, or to the landowners as impropiators of the tithes of their respective lands. And the return alleged that "the question raised at the said meeting concerning the said tithes of lamb and wool was a question of title."

The return proceeded to state that, in 1812, the present vicar filed a bill in Chancery against certain occupiers of land in the said parish for the subtraction of tithes (including lamb and wool), and that a question was raised by the said suit for the decision of that Court, whether the lands of the said parish were ever liable to the payment of tithes of lamb and wool in kind *to the vicar, and whether from time im- *160] memorial the said lands had not been wholly free from the payment thereof. That, on 14th November, 1817, a decree of the Court of Chancery was made in the said suit (which decree was set out, and by which it appeared that the defendants contended that, by an agreement in 1697, confirmed by a decree in Chancery in 1699, between the then vicar and certain occupiers of lands in the said parish, a part of

certain newly enclosed lands was allotted to the vicar in lieu of all tithes arising to him from the said enclosed lands; (a) and, by a subsequent agreement in 1707, between the then vicar and landowner, 1½d. per acre was agreed to be paid to the vicar by the said landowners in lieu of all small tithes throughout the parish); which decree of November, 1817, ordered, among other things, the Master to take an account of the tithes of lambs and wool as being due to the vicar, dismissing his bill as to tithes of hay, also claimed by him. That, after this decree, all the defendants in that suit, except one William Dawson, who was tenant to the impropriate rector, paid the vicar five years' arrears of tithes so decreed to him.

The return then stated that in 1819 the then impropriate rectors filed a bill in Chancery against the present vicar for the tithes of wool and lamb, setting up, among other things, the said decree of 1817; and that, on the 25th January, 1821, the bill was dismissed with costs. That, in 1821, the said W. Dawson preferred a petition to the Court of Chancery, to exhibit a supplemental bill *in the original suit in which the decree of 1817 was made, and to prove that the vicar [161 was not entitled to tithes of lamb and wool, or any compensation or satisfaction for the same, which petition was ordered to be dismissed with costs; and an appeal against such order was also dismissed. That, after this last decree, the said W. D. paid all the arrears of tithes decreed to be paid by him, including the arrears of the tithes of lamb and wool. That, since 1817, all the tithe payers in the parish, except the said W. D., had paid or compounded for the tithes of lamb and wool to the vicar; that the Tithe Commissioners, considering that the said decrees established the principle that the said tithes of lamb and wool were payable to the vicar in kind, and that neither the rector, nor any other person whatsoever, other than the vicar, had ever any title to the said tithes, sent, on 5th June, 1845, an answer as follows to a requisition made to them by the agents of the landowners.

"Gentlemen. In answer to your requisition to the Tithe Commissioners for England and Wales, I am directed to inform you that their power to confirm agreements touching tithes made before the passing of the act 6 & 7 W. 4, c. 71, is confined to such agreements as are not of legal validity. (b) The Tithe Commissioners are of opinion that, as between the landowners and the impropriate rector of the parish, the agreements you refer to are valid, and therefore that it would be improper in the Tithe Commissioners to affect to give validity to what requires no confirmation on their part. So far as the vicarial rights are concerned, the Tithe Commissioners are, indeed, of opinion that

(a) The return in this case did not set out the further agreement, at the same time, by the landowners, to pay to the impropriate rector 1s. per acre, yearly, in lieu of tithes arising to him from certain other old enclosed lands. See, however, the writ; also *Regina v. Tithe Commissioners*, 14 Q. B. 459, 461 (E. C. L. R. vol. 68).

(b) See stat. 5 & 6 Vict. c. 84, s. 7.

*162] the said *agreements are not valid; but they do not therefore feel that they are bound to confirm them; and, after giving the subject their best consideration, they decline doing so. I am further to inform you that, looking at the perception of tithes by the vicar, and the rights which, under the 12th section of the Act for the Commutation of Tithes, such perception gives, considering also the decree made by the Court of Chancery in 1819, dismissing with costs the bill of the impropiator praying to be declared owner of the tithes of lamb and wool in the said parish, they think they are bound to act on the principle of that decree, and, adverting to the 44th section of the Tithe Act, and bowing to the dicta of several of the Judges of Her Majesty's Courts at Westminster, intimating that the Tithe Commissioners ought not to deal with questions of title, they have before them all the requisites for making an award, and decline making the previous decisions you require."

The return then alleged that, in 1845, an application was made to this Court by the said landowners for a writ of mandamus to compel the Tithe Commissioners to confirm the agreements, and to decide and determine the differences then alleged to be pending. The return then stated the issuing of the writ and the return to it, and the demurrer thereto, and judgment for the Commissioners.(a) That, on 21st February, 1850, the assistant Tithe Commissioner made his final award concerning the commutation of the tithes in the said parish; after which the agents of the landowners had a fortnight's notice that the Tithe Commissioners were about to confirm the award; and, the landowners not having given any notice of their intention to raise the *163] question now raised, *the said Tithe Commissioners, considering "that the said disputes and differences were not such as should hinder or did hinder the making" their award, on 28th February, 1850, duly confirmed the said award.

The award was then set out, which found that 5841 acres, 2 roods and 23 perches in the parish were subject to payment of all manner of tithes in kind; and that Sir George Farrant and Thomas Farrant, Esq., were impropiators of all great tithes arising upon the ancient enclosures of the township of Great Hale; and that Richard Godson, Esq., was impropiator of all great tithes arising upon the ancient enclosures of the township of Little Hale; and that the owners of all the rest of the lands in the parish were impropiators of all great tithes arising upon their respective lands; and that the vicar for the time being was in possession of the tithes of wool and lamb arising upon all the titleable lands of the parish, and was entitled to all the residue of the tithes of the parish: And it proceeded to award an annual rent-charge of 10*l.* 6*s.* 4*d.* to Sir G. Farrant and T. Farrant; 8*l.* 13*s.* 8*d.* to Mr. Godson; 1162*l.* to the several landowners of the parish in the

(a) See *Regina v. Tithe Commissioners*, 14 Q. B. 459 (K. C. L. R. vol. 68).

proportions specified in the schedule, in lieu of the tithes to which these parties were respectively entitled; and 360*l.* "to the vicar for the time being, or to the party lawfully entitled to the same," instead of all the tithes of lamb and wool arising upon or in respect of all the titheable lands of the said parish; and 450*l.* instead of all the residue of the tithes in the said parish.

Demurrer, assigning several special grounds. Joinder.

The demurrer was argued in last Hilary term.(a)

**Cowling*, for the prosecutors.—First, the writ is good. It [*164 will be contended that the difference which the mandamus calls upon the Commissioners to decide relates to a question of title, and therefore is not within the provisions of stat. 6 & 7 W. 4, c. 71, s. 45. But the question really is, not to whom the tithes in question are payable, but whether or not the lands are exempt from the payment of tithes, either altogether, or (with respect to the enclosed lands) by the substitution of a modus of one shilling per acre. It was necessary for the prosecutors, in alleging the existence of that modus, to state to whom it was payable, namely, the inappropriate rector: but that does not make the question, as is contended on the other side, one of title between the inappropriate rector and the vicar. The statement, moreover, is laid under a videlicet. [COLERIDGE, J.—That would not make it immaterial, if it were material without it. Lord CAMPBELL, C. J.—You must show that all the writ is good. As regards the old enclosed lands, the question was to whom the modus was payable, the inappropriate rector or the vicar. That must surely be a question of title.] In *University College v. Garton*, 10 Q. B. 760 (E. C. L. R. vol. 59), it was held that a feigned issue, to try whether certain lands in a parish were liable "to render to the vicar for the time being of the said parish any manner of tithes," did not raise a question of title between the vicar and other parties. [Lord CAMPBELL, C. J.—There the only point in dispute was whether the land was liable to pay vicarial tithes at all: in the present case we know that it is in dispute to whom the tithes should be paid.] It does not so appear upon the writ; and the Court will not *look beyond that. In *Regina v. Tithe Commissioners*, 15 Q. B. [*165 620 (E. C. L. R. vol. 69), the writ expressly averred that the point in dispute was a question to which of the two, the rector or the vicar, the tithes were payable; and the writ commanded the Commissioners to make their decision "as to the person entitled to the tithes."

Next, the return is bad. None of the various proceedings which it sets out is such as to deprive the Commissioners of their power to decide the differences mentioned in the writ. The questions which were settled by the mandamus in 1845 are not the same as those referred to in the present writ. But, even if they did form part of the matters now in dispute, the Commissioners are not precluded from hearing and

(a) January 24th and 28th. Before Lord Campbell, C. J., Patteson, Coleridge, and Wightman, J.

determining them. Sect. 44 of stat. 6 & 7 W. 4, c. 71, provides that, if, before the making of the award by the Commissioners, any question as to the existence of a modus or customary payment, or any question as to exemption from or non-liability to the payment of tithes, shall have been already decided by competent authority, the Commissioners shall act upon the principle of such decision in making their award: but that applies only to cases where, at the time of the making the award, the propriety of the decision is not called in question. Where it is disputed, the Commissioners are bound, under sect. 45, to hear and determine. And sect. 44, under any circumstances, can apply only to the precise point which has been decided, and to those persons who were bound by such previous decision; *Croughton v. Blake*, 12 M. & W. *166] 205:† it is therefore no bar to the setting up of new grounds of exemption, and still less so when those grounds are set up by new parties, as in the present case. The same arguments apply to the suit of 1812, and to the various proceedings which followed upon it. The decrees in 1817 and 1821 related, no doubt, to part of the questions now raised; but those decrees were not binding even on the parties to the bills, inasmuch as the ordinary had not been made a party; 2 *Eagle on Tithes*, 205, 398, *Gordon v. Simkinson*, 11 Ves. 509. It will be contended that the prosecutors are bound by the award of the Commissioners which is set out in the return. But the Commissioners had notice that the present differences were pending; and they were bound by sect. 45, to hear and determine them before making their award. The award, therefore, is at all events void as regards those matters in difference. [Lord CAMPBELL, C. J.—May not the Commissioners decide that the differences of which notice has been given to them are not such as to hinder the making of their award, and thereupon proceed to make their award at once? COLERIDGE, J.—The statute, in such cases, provides a mode of appeal, under sect. 46.] The Commissioners are, at all events, bound to have the matters in difference regularly brought before them, as provided by sect. 45, before they can decide whether or not they affect the award. Sect. 52 will be relied on, which makes every confirmed award of the Commissioners binding on all persons interested in the lands or tithes. But that is explained by sect. 66, which declares that no confirmed award shall be impeached by reason of any mistake or informality therein. The statute, therefore, cures only technical irregularities; **Morris v. Duke of Norfolk*, *167] 9 Sim. 472, 492, 3. [Lord CAMPBELL, C. J.—According to your argument, an award of the Tithe Commissioners could be set aside at any time.] Except on the ground of mere informality in the proceedings. Moreover, the words in sect. 52 are “every such confirmed award;” that is, by sects. 45, 50, 51, every award confirmed after all differences which are within the jurisdiction of the Commissioners to determine have been decided by them. But even if the award here

were valid, the Commissioners have power, under stat. 2 & 3 Vict. c. 62, s. 8, to make a fresh award if the former be "unjust" through any "manifest error." [PATTESON, J.—The writ, as it seems to me, clearly raises a question of title between the impropiator and the vicar; the award is not material to that; it awards, conditionally, 860*l.* by way of rent-charge in lieu of tithes to the vicar "or to the party lawfully entitled to the same;" but that award is subject to the question of the vicar's right to those tithes.]

Bovill, contra, was stopped by the Court.

[Lord CAMPBELL, C. J.—Our opinion is at present against the prosecutors: but we will take time to consider our judgment.]

Cur. adv. vult.

COLERIDGE, J.,(a) now delivered the judgment of the Court.

The writ of mandamus in this case states that there were certain differences between certain landowners of *the parish of Great Hale and the vicar, viz., as to the old enclosed lands, whether they [*168 were wholly exempt and discharged from the render of great tithes and tithes of wool and lamb, or, if not exempt, whether they were subject only to the payment of 1*s.* yearly, to wit, to the impropiator of the said parish, for and in lieu of great tithes and tithes of lamb and wool, and, as to new enclosed lands, whether they were wholly exempt from great tithes and tithes of wool and lamb. The writ then commands the Commissioners to appoint a time and place for hearing and determining the said differences so pending.

The return states a meeting before the Assistant Commissioner, on 24th April, 1843, pursuant to notice, at which the vicar claimed tithes of wool and lamb, and the agent of the landowners contended that, by a decree of the Court of Chancery in 1699, all the tithes of the parish had been commuted: that the meeting was adjourned to ascertain whether the Tithe Commissioners would consent that all the evidence relating to the disputes and differences which had so arisen should be heard before an assistant Commissioner; that a further notice was given by the Commissioners, for 22d February, 1844, to hear and determine certain differences whereby the making their award was alleged to be hindered. That such meeting was held before an assistant Commissioner, when the parties attended by counsel. The vicar proposed that a feigned issue should be tried as to the right to the tithes of lamb and wool, the Commissioner first awarding a rent-charge in lieu of them to the party entitled; but the landowners insisted that those tithes were extinguished by an agreement and decree of the Court of Chancery, and that a difference was existing *between the landowners, vicar and impro- [*169 priator, and required the Commissioner to decide it. That it was arranged that time should be given to the parties to consider whether they would consent to try a feigned issue as to the title to the tithes of

(a) The only Judges in Court were Coleridge and Crompton, Js.

lamb and wool, and that, if they did not, the landowners should be at liberty to apply to this Court for a mandamus to compel the Commissioners to try the question whether the said tithes of lamb and wool belonged to the vicar or to the landowners as impropiators of their respective lands, being a question of title. The return then states a bill in Chancery, filed by the vicar (the same person as is now vicar) in 1812, against certain landowners for substruction of tithes, in which a question was raised whether the lands were ever liable to payment of tithes of lamb and wool to the vicar. It then states a decree of the Court of Chancery of the 14th November, 1817, by which it appears that the defendants set up an agreement of 1699, confirmed by a decree of the Court, and a subsequent agreement of 16th September, 1707, as binding on the vicar, which he denied to be binding on him, and by which decree of November, 1817, the Court ordered the master to take account of the tithes of lamb and wool as due to the vicar, dismissing his bill as to the tithes of hay. The return then states a bill in Chancery, in the year 1819, by the impropiators against the vicar, for the tithes of wool and lamb, which bill was dismissed out of Court with costs. The return then states a petition preferred in 1821 to Vice-Chancellor Sir J. Leach, by one of the occupiers in the parish, for leave to file a supplemental bill in the original suit in which the decree of 1817 was made, and to prove that the vicar was not entitled to tithes *170] of lamb and wool, which petition was dismissed with costs. It then states an appeal to the Lord Chancellor, which was dismissed with costs.

The return then states the perception of tithes of lamb and wool by the vicar, and, further, that the Tithe Commissioners, considering that the decrees had established the right of the vicar, on the 5th of June, 1845, in answer to a requisition from the agent of the landowners, declined to confirm the invalid agreements of 1699 and 1707, or to decide the question of title. It then states the application to this Court, in 1845, for a writ of mandamus to compel them to confirm the agreements and to decide the existing differences, the issuing of the writ, and the return to it, and demurrer, and judgment for the Commissioners in December, 1849, which is reported in *Regina v. Tithe Commissioners*, 14 Q. B. 459 (E. C. L. R. vol. 68). It then states that the Assistant Commissioner, on 21st February, 1850, made his final award, but the confirmation of it was delayed until the 28th February in the same year, which delay was in order to give the landowners an opportunity to make any further claim before such confirmation; and notice was given to the agent of the landowners of their intention to confirm the award about to be made, a fortnight before the 28th February. The return then sets out the award, which finds all the titheable lands in the parish subject to tithes in kind, states who are the impropiators of the great tithes, and that the vicar is in *possession* of the tithes of lamb and wool,

and entitled to the residue of the tithes. It then fixes a rent-charge of 10*l.* 6*s.* 4*d.* to Sir George Farrant and Thomas Farrant, 8*l.* 13*s.* 2*d.* to Mr. Godson, 1162*l.* to *the several landowners, 860*l.* to the vicar for the time being or *party entitled*, in lieu of tithes of lamb [*171 and wool, and 450*l.* to the vicar for other tithes.

To this return there is a special demurrer. From the writ of mandamus itself we gather that, when the vicar is claiming tithes of lamb and wool, the landowners say that their lands are exempt from these tithes by reason of the payment of 1*s.* per annum in lieu of them to the impropiator. Now this either means that the impropiator, and not the vicar, is the owner of these tithes, but is bound to receive 1*s.* per annum in lieu of them (and, if that be the meaning, it raises at once a question of title between the impropiator and the vicar, which is a difference that the Commissioners cannot determine, and so the writ is bad; *Regina v. Tithe Commissioners*, 15 Q. B. 620 (E. C. L. R. vol. 69)), or it means that the vicar is the owner of these tithes, but cannot receive them because 1*s.* per annum is paid to the impropiator in lieu of them; a startling proposition, which one would think could hardly be supported by any state of circumstances. When, however, we come to look at the statements in the return, we find that this 1*s.* per acre is not an immemorial payment or modus, but has its origin in the agreement in 1697. That agreement may be binding on the impropiator; but it is invalid as regards the vicar, which the decrees in Chancery abundantly show; and so plainly is this the case, that the landowners endeavoured to persuade the Commissioners to confirm it, as being an invalid agreement under the 7th section of stat. 5 & 6 Vict. c. 54, and, failing so to persuade them, obtained a writ of mandamus to compel them, in which also they failed, *and do not now at- [*172 tempt to renew such compulsion; for this Court has already expressly decided, in *Regina v. Tithe Commissioners*, 14 Q. B. 459 (E. C. L. R. vol. 68), that the agreements are not such as the Commissioners were bound to confirm. If, then, the agreement be binding on the impropiator only, and not on the vicar, and the 1*s.* in lieu of tithes of lamb and wool be payable only under the agreement, it is plain that it can only be a payment exempting the lands from render of those tithes on the supposition that the impropiator is the owner of them: the vicar, if he be owner of them, is manifestly entitled to them in kind. In other words, the question is, in this view of it, one of title.

Again, it appears, by the return, that the Commissioners declined to go into further discussion, because they found the vicar in possession of the tithes of lamb and wool, and considered themselves bound by the principle of the decrees in Chancery, according to the 44th section of stat. 6 & 7 W. 4, c. 71. The learned counsel for the landowners argued that they are not bound; and cited authorities which show that, when a feigned issue is tried under the 45th section of the Act, the Judge

and jury are not so bound: and that is perfectly true; but it shows only that the landowners ought to have adopted the course of trying a feigned issue, which, as appears by the return, was proposed by the vicar and declined by them; if, indeed, there was any question which could be tried in such an issue between those parties.

Looking at the whole of the pleadings in this case, namely, the writ *178] and the return, it is manifest that no difference existed between the vicar and the landowners by which the making the award was hindered, nor any which the Commissioners had power to hear and determine. The question is purely one of title between the impropiator and vicar, which may still be contested under the provisions of the 71st section of the Act, which gives all persons who have claims to the tithes the same rights of claiming the rent-charge allotted in lieu of tithes.

We are, therefore, of opinion that, even if the writ be good, which we think very doubtful, the return is a sufficient answer to it, and that judgment must be given for the Commissioners.

Judgment for defendants.

Ex parte RAMSHAY, Esq.

Application was made for a quo warranto against a county court judge, on the relation of a person who had held the office immediately before him, and who had been removed for inability and misbehaviour by the Chancellor of the Duchy of Lancaster, under stat 9 & 10 Vict c. 95, s. 18.

It appeared that, on a memorial addressed to the Chancellor, charging the relator with general misbehaviour, and particularising one instance more strongly, and praying for his dismissal, the Chancellor had held an inquiry, which was attended by the relator and his counsel, and had heard evidence on the charges, not on oath or affirmation, and within a few days after the close of the inquiry, had dismissed the relator by an instrument finding inability and misbehaviour, but not specifying any particular instance. Affidavits denying the inability and misbehaviour in the cases adduced on the inquiry, and generally, were put in.

This Court refused the rule, it not appearing that the relator had not been fully heard, or that the charges, if true, did not show inability and misbehaviour; and the decision of the Chancellor being therefore final. And the Court held it not necessary that, after the inquiry had closed, a fresh notice to the relator should have been given, to show cause against his being dismissed.

SIR F. KELLY, in last term, (a) moved for a rule to show cause why *174] an information in the nature of a quo warranto should not be filed against Joseph Pollock, Esq., for using the office of judge of the county court of Lancashire held at Liverpool.

He moved on the relation of William Ramshay, Esq., barrister at law. Mr. Ramshay deposed: That in April, 1850, he was appointed judge of the county court of Lancashire (holden at Liverpool), by the Earl of Carlisle, then Chancellor of the Duchy of Lancaster; (b) and that

(a) January 31st, 1852. Before Lord Campbell, C. J., Patteson, Coleridge, and Wightman, J.

(b) See stat. 9 & 10 Vict. c. 95, s. 16.

he had exercised the office until 24th November, 1851, when Joseph Pollock, barrister at law, intruded himself into the office by virtue of some alleged appointment; and the said J. Pollock had since continued to perform it, and assumed the character of such judge, and was attempting to appropriate the salary and exclude the relator from the office. Mr. Ramshay was advised and believed that he himself still of right filled the office. The affidavit then stated:

"That he, this deponent, has at all times, since his said appointment to the said office, in all respects conducted himself with propriety and proper ability in the said office, and without any inability or misbehaviour whatsoever: and that this deponent has not resigned the said office, or been guilty of any misbehaviour or inability in or with reference to or in respect of the said office of judge of the said court, or in his character of judge of the said court or otherwise: and that he never became liable to be dismissed from his said office of judge of the said court in any way whatsoever, or for any cause whatsoever. Nevertheless this deponent says that the said Earl of Carlisle did, on the said 24th day of November, 1851, by a document under his hand and *seal," "illegally and improperly, and contrary to the statute in that behalf," "as this deponent is advised and believes, affect and [*175 claim, and pretend, as Chancellor of the said Duchy, to remove this deponent from his said office of judge of the said court on account of some supposed and pretended inability and misbehaviour; which this deponent, on his oath aforesaid, says never existed." A copy of the instrument of dismissal was annexed to the affidavit. It was as follows.

"To all to whom these presents shall come: I, The Right Honourable George William Frederick, Earl of Carlisle, Chancellor of the Duchy of Lancaster, send greeting. Know ye, that, William Ramshay, Esquire, barrister at law, now being judge of the county court of Lancashire holden at Liverpool in and for a district whereof the whole is in the Duchy of Lancaster, duly appointed, divers reports, representations, and circumstances relating to the ability and behaviour of the said W. Ramshay, as such judge and in the said office, made it proper and necessary for me, being Chancellor as aforesaid, and by virtue of my said office, and under and by virtue of the statute passed," &c. (9 & 10 Vict. c. 95, "For the more easy recovery of small debts and demands in England"), "to inquire, examine into, and ascertain the ability and behaviour of the said W. R., as such judge, in his said office; and thereupon due notice was given to the said W. R. in that behalf; and afterwards, and in the presence and hearing of the said W. R. and of his counsel, I, the said G. W. F., Earl of Carlisle, Chancellor as aforesaid, did accordingly make due inquiry and examine into the ability and behaviour of the said W. R., as such judge, in his said office; and the said W. R., having heard the several matters brought before me in that behalf in his pre-

*176] sence as aforesaid, *did, by himself and his counsel, make and urge such defence and answer to the said several matters as he thought fit: Now I, the said G. W. F., Earl of Carlisle, Chancellor as aforesaid, having duly weighed and deliberately considered the said several matters and premises aforesaid, do find, determine, and adjudge that the said W. R. is unable duly and properly to execute his said office of judge of the aforesaid county court, and the duties thereof; And I do also find, determine, and adjudge that the said W. R. has misbehaved himself in his said office of Judge, and in the duties thereof: And therefore, and for such several and respective causes and reasons, and under and by virtue of the said statute, I think fit to, and do hereby, remove and discharge the said W. R. from his said office of judge of the county court aforesaid: And I do hereby declare the said W. R. removed and discharged from the said office of judge of the county court aforesaid accordingly. In witness whereof I have hereunto set my hand and seal, this 24th day of November, A. D. 1851.

"Witness F. Dawes Danvers,

CARLISLE.

"Duchy of Lancaster Office, London."

Mr. Ramshay further deposed that the said document was delivered to him by a messenger, who at the same time delivered a sealed letter from the Earl of Carlisle; of which a copy (excepting a paragraph marked private, and not material to the present question) was annexed, and which was as follows.

"November 24, 1851.

"Dear Sir, This letter will reach you together with the very painful intimation of the decision to which I have thought it my duty to come.

One thing I request you to believe, which is, that nothing I am about
*177] to observe is written with the *intention or wish to deprecate any proceeding on your part in consequence of that decision, which you might see fit to adopt. Still, in taking a step which I fear you can only regard as one of a most inimical character, I cannot, in justice to truth; refrain from recording my conviction that the person whom I am thus removing from the post where I had placed him has very many good and some great qualities; that he has conferred essential benefits on the community amidst which he prosecuted his labours, now abruptly terminated; and that, in addition to other more private and personal reasons, I feel on these grounds much additional sorrow to have been unable to resist the conclusion that he had not the degree of self-command to enable him properly to perform the duties of the judge of the county court of Liverpool.

You will have perceived that this is not an official communication; still less is it one to which I expect any reply: but you are welcome to make any use of its contents you may deem proper.

I am, dear Sir, Your faithful servant,

CARLISLE."

Mr. Ramshay further deposed that he, after receipt of those two

documents, wrote to the Earl of Carlisle, requesting to be informed in respect of what particular act or acts, word or words, he had claimed to remove Mr. Ramshay; and that Mr. Ramshay received a letter from the Earl simply acknowledging the receipt of Mr. Ramshay's letter, and giving no information. The affidavit contained a statement as to circumstances preceding the delivery of the order of removal; and it set forth a copy of a memorial presented to the Earl on *9th [178 October, 1851, signed by certain inhabitants of Liverpool. The memorial was as follows.

"To The Right Honourable the Earl of Carlisle, Chancellor of the Duchy of Lancaster.

"The memorial of the undersigned inhabitants of the borough of Liverpool, in the county of Lancaster,

"Showeth: That your memorialists have occasion, which they deeply deplore, to address your Lordship in the language of indignation and complaint at the conduct pursued by William Ramshay, Esquire, the judge of the Liverpool county court, since his acquittal(a) by your Lordship and the commencement of his sittings. That Mr. Ramshay has brooded over wrongs, erroneously supposed to have been committed against him by the public press of Liverpool, until he has come to view all their acts in which his name is in any way mixed up through a distorted and distempered medium; and, as evidence of this unhappy temper, he has, on several occasions, declared his intention of making an example of persons who were supposed to be his accusers previous to the late investigation before your Lordship. Under the influence of this morbid state of mind, he has lately denounced a most innocent placard (accidentally placed upon a wooden paling near his court, and used by bill-stickers for all their placards) as a libellous attack upon himself, and as a contempt of his court: and, in the assertion of his power (of which he entertains a very exalted opinion) to visit all acts which he chooses to consider contempts of his court in a summary manner, he has lately sent a person, stated to be an officer of his court, with verbal directions only to bring Mr. Michael *James Whitty, the publisher of the placard above mentioned, [179 to his court. The officer proceeded to Mr. Whitty's place of business, with a companion, to execute their verbal order. Mr. Whitty demanded their authority; and, on their stating they had none to produce, he refused to accompany them, but, at the same time, expressed his willingness to wait until they could procure either a warrant or summons from the court. This they refused to do; and, having recourse to force to compel him, they were resisted by Mr. Whitty and his son, and some of his servants; and they did not accomplish their object. The judge afterwards issued his summons, which was left at Mr. Whitty's dwelling-house, requiring him to attend his court to answer for con-

(a) See post, p. 182.

tempt. Mr. Whitty immediately obeyed the summons; when the judge not only went into the consideration of the questions of contempt of court with respect to the placard adverted to, but into charges of insulting and assaulting the officers of the court in discharging the verbal requisition that he (Mr. Whitty) should attend the court, and the resisting them in their attempting to take him to the court by force. And the judge ordered Mr. Whitty to pay a fine of 5*l.* for insulting the court, or to be imprisoned seven days at Lancaster Castle, and be imprisoned at Lancaster Castle absolutely for two terms of seven days for assaulting the officers, and to pay two other fines, of 5*l.* each, for insulting the officers, or to be imprisoned fourteen days. The two penalties of seven days' imprisonment absolutely, for assaulting the officers, the judge afterwards withdrew, substituting the infliction of fines of 5*l.* each, or seven days' imprisonment in each case in default of payment.

*180] The fines *were not paid; and Mr. Whitty was sent to Lancaster Castle. Two days after the hearing of the charges against Mr. M. J. Whitty, Mr. John Whitty attended on a summons for assaulting the officers; and, in result, he was fined in four penalties, of 40*s.* each, for assaulting and insulting the officers; in default of payment as to the assault the judge imposed an imprisonment in each case; and, as to the two penalties for insulting the officers, he stated that the amounts would be recoverable as debts under the County Courts Act; and, if not paid, that the defendant would be liable to two imprisonments of forty days each. Orders were drawn up to send Mr. John Whitty to Lancaster; when the inhabitants of Liverpool interposed and paid all the fines of Mr. John Whitty, to prevent his going to Lancaster, and paid the fines of Mr. M. J. Whitty, and procured his discharge from Lancaster Castle; when the following receipt was given to the contributors. 'Liverpool, 2 October, 1851. Mr. J. R. Jeffrey has this day paid me, under protest, the sum of 33*l.*, on account of Mr. Michael James Whitty and Mr. John Whitty, viz., Mr. Michael James Whitty 5*l.* for wilfully insulting the judge in going to the court; 5*l.* for wilfully insulting Robert Hartley, an officer of the court, whilst going to the court; 5*l.* for wilfully insulting Roger Charnley, an officer of the court, whilst going to the court; 5*l.* for assaulting Robert Hartley, an officer of the court, in the execution of his duty; and 5*l.* for assaulting Roger Charnley, an officer of the court, in the execution of his duty; and Mr. John Whitty 2*l.* for assaulting Robert Hartley, one of the officers of the court, in the execution of his duty; 2*l.* for assaulting Roger Charnley, one of the officers of the court, in the execution of his duty; *181] *2*l.* for wilfully insulting Robert Hartley, one of the officers of the court, in going to the court; and 2*l.* for wilfully insulting Robert Charnley, one of the officers of the court, in going to the court. WILLIAM STRATHERN, Clerk of the County Court of Lancaster holden at Liverpool.'

"That, throughout the proceedings, Mr. Whitty, senior, exhibited no contumacy: on the contrary, whilst at his own place of business, he expressed his readiness to obey the court if served with a written request, and accordingly did so as soon as he was served with the summons: and, throughout the inquiry against him, which lasted about seven hours, he was patient, respectful, and forbearing, never uttering even a single word, although very many observations fell from the judge greatly calculated to wound and exasperate him. That the judge of the county court, on the other hand, throughout the proceedings against Mr. M. J. Whitty and Mr. John Whitty, in his various characters of accuser, witness, judge, and jury, was pre-eminently harsh, vindictive, and oppressive. That the construction put by the judge of the county court on the clauses of the County Courts Act, in reference to cases of contempt, is, as your memorialists believe, unconstitutional and illegal: and, if it were otherwise, that his unprecedented assumption of authority, and the temper which he has displayed in attempting to enforce that authority, plainly demonstrate that he has not the moderation and equanimity which are essential to the character of a county court judge. At the same time, the violent and unexpected measures resorted to by Mr. Ramshay, for upholding what he calls the dignity of his court, have alienated the great majority of the trading community; so that this court must be a comparatively useless one so long as Mr. Ramshay shall be suffered to preside there. Your memorialists, in [*182 conclusion, pray that your Lordship would be pleased to hold in Liverpool, or its immediate neighbourhood, a court of inquiry into the conduct of Mr. Ramshay since his acquittal by your Lordship from the former charges made against him, and his resumption of his sittings. And that, if the foregoing facts be established against him, as your memorialists confidently believe they can be, that your Lordship would be pleased to remove Mr. Ramshay from the office of judge of the county court of Liverpool, and to appoint another judge, of learning, temper, and moderation, in his stead."

Mr. Ramshay deposed that a copy of this memorial was sent to him from the Duchy Office, with a letter from the clerk of the Duchy (which could not be found) inquiring whether Mr. Ramshay admitted or denied the charges. Mr. Ramshay wrote to the Earl of Carlisle at great length, presenting, as he deposed that he believed, a correct view of most of the material circumstances known to him connected with the charges; and referring to a former inquiry into his conduct, which had been held by the Earl of Carlisle, in the preceding June, some particulars as to which were stated in the present affidavit, and upon which, it appeared, the Earl of Carlisle had declined to remove him: and Mr. Ramshay now urged the Earl of Carlisle not to harass him with another inquiry so soon after the former, and protested against the same. Mr.

Ramshay afterwards received from the clerk of the Duchy a letter, a copy of which was annexed to the affidavit, and which was as follows.

"Duchy of Lancaster Office," &c.,

Sir,

"October 23d, 1851."

*183] I am directed by the Chancellor of the Duchy of Lancaster to acknowledge the receipt of your letter of the 20th instant, and of your observations with reference to the late proceedings in the county court of Liverpool, on the subject of which his Lordship had received a memorial, of which a copy was forwarded to you by his desire on the 14th instant. His Lordship desires me to inform you that, after weighing all the circumstances, he has decided to hear evidence in support of and against the charges on Wednesday, the 5th November next, at 10 o'clock in the forenoon, at the Court House at Preston, in the County Palatine of Lancaster; notice of which will be given to the memorialists. I am to add that yourself and the parties complaining will have the opportunity of being there represented by counsel, if thought fit.

"I am, Sir, &c., F. DAWES DANVERS."

An inquiry was held at Preston, which was attended by Mr. Ramshay, personally and by counsel. No part of the evidence against Mr. Ramshay was given upon either oath or affirmation. Mr. Ramshay further deposed "that he has never, at any time, been called upon by the said Chancellor to show cause why he should not be removed from his said office of judge of the county court of Lancashire holden at Liverpool; but that he was merely called upon to show cause why an inquiry should not be held, and to state whether he admitted or denied the charges of misconduct alleged against him in the said memorial, and before the said inquiry was held at Preston. And that this deponent had no notice, before the said decision, or after the said inquiry, or after the said Chancellor had considered the said evidence, to show cause why he should not be dismissed; and that he, this deponent, never was called upon by or on behalf of the said Chancellor, at any time, to show cause why this deponent should not be dismissed from *his said office; *184] and that he, this deponent, has never been informed, at any time, that the said Chancellor was about to dismiss this deponent, except by the actual dismissal itself, which came upon this deponent entirely by surprise. And that, if this deponent had had notice, and the opportunity, to show cause against the said dismissal before it was pronounced, he, this deponent, is advised and believes he could have shown to the Chancellor valid reasons why he, this deponent, ought not to have been dismissed." "That this deponent protested to the said Chancellor, in the most emphatic manner, in a long letter addressed and forwarded by this deponent to the said Chancellor before the said inquiry at Preston was fixed by the said Chancellor and notified to this deponent, against the said inquiry at Preston, or any other, being held by the said Chancellor for the purpose of inquiring into the said sup-

posed charges of misconduct in the said memorial; and protested, in the strongest manner, that the said supposed charges were matters of law cognisable by the ordinary legal tribunals, and that the said Chancellor ought not, therefore, to assume to himself to call in question, or to presume to adjudicate upon, the said supposed charges of misconduct; and then and there, in the said letter, stated to and warned the said Chancellor that neither this deponent nor the said memorialists would abide by the decision of the said Chancellor thereon, and that most certainly this deponent would not submit to be bound by the decision of the said Chancellor thereon; and that they were not proper subjects for the consideration of the said Chancellor, but consisted simply of the judicial action and decisions of this deponent upon certain cases of contempt before this deponent as judge of the said court, and depended upon the construction *of the County Courts Act in a matter [185 upon which there had been no distinct judicial decision of the superior Courts at Westminster upon the section in question of the County Courts Act. That, after and under this protestation, deponent attended at Preston solely from and out of respect to the said Chancellor, and under the impression that the said Chancellor had appealed to the honour of this deponent to show the entire propriety of his own conduct, and to remove some false impressions in the public mind, and thus place this deponent and his patron the said Chancellor in a proper position in the eyes of the world; and that, by so attending under protest, deponent did not intend in any way to waive his legal rights, and stated, by his counsel in court at Preston, before the commencement of the said inquiry, that actions were brought or intended to be brought against deponent for his conduct relative to the matters in question, and that he might be prejudiced therein by the said inquiry and by the delay and distraction and expense incident thereto and otherwise."

The affidavit further entered into the merits of the matters discussed on the inquiry, which comprehended, besides the charge in respect of the conduct of Mr. Ramshay towards Messrs. Whitty, numerous other alleged instances of misbehaviour, in respect of temper and demeanour. The charges were denied and explained by the affidavits of Mr. Ramshay and many other deponents: and the affidavits also contained depositions in favour of Mr. Ramshay's general conduct and abilities as a judge. Mr. Ramshay also deposed to circumstances from which he inferred that the charge against him had been made principally at the instance of a society at Liverpool called the Guardian Society: and his *affidavit [186 impugned the motives of the society and of other persons who had taken a part in preferring the charges.

Sir *F. Kelly*, in support of his motion.—The affidavits show that the dismissal was not warranted by the facts. [Lord CAMPBELL, C. J.—We cannot enter into the merits: it was for the Chancellor of the Duchy to decide upon them.] The relator is entitled to the opinion of a jury on

the question of "inability or misbehaviour," within the meaning of stat. 9 & 10 Vict. c. 95, s. 18. [Lord CAMPBELL, C. J.—Do you say that Mr. Ramshay was not heard, or that the matters charged did not show inability or misbehaviour?] The relator's case is that the charges were not supported by the evidence: and, as to this, the decision of the Chancellor is no more final than the decision of a rector upon the dismissal of a parish clerk. A clerk so dismissed is entitled to a mandamus to be restored. [Lord CAMPBELL, C. J.—Is that so where the clerk has been heard?] The judgment of the rector is not final: *Rex v. Warren*, 1 Cowp. 370. But, further, the language of sect. 18 shows that the fact of inability or of misbehaviour is necessary to give the Chancellor jurisdiction. The statute gives no power to the Chancellor to examine upon oath; nor has he any means of inquiry beyond those which a private individual would have. The proceeding, therefore, is not in the proper sense of the word judicial. Consequently, unless the remedy now asked for can be granted, the party dismissed has really no means of insuring a legal inquiry at all. As the evidence was not, and could not be, given upon oath, the judgment of the Chancellor *187] may be *grounded upon testimony the falsehood of which will not subject the witnesses to a prosecution for perjury. It is highly improbable that the Legislature should have intended such an inquiry to be final. This Court appears to have decided in favour of the principle for which the relator contends, in *Regina v. Owen*, 15 Q. B. 476 (E. C. L. R. vol. 69). There, under sect. 24 of the same statute, the judge of a county court dismissed the clerk of the court; and the dismissal was approved of by the Lord Chancellor. It was held that the dismissed clerk was entitled to question the validity of the dismissal by an inquiry in the nature of a quo warranto against his successor: and, issue being joined as to the fact of inability, and the jury having specially found only facts which, in the opinion of this Court, did not amount to inability, judgment was given for the Crown. The instrument of dismissal here does not specify the inability: it may have been no more than existed in *Regina v. Owen*. [Lord CAMPBELL, C. J.—It there appeared that the only inability suggested was insolvency. Do your affidavits here show that nothing was charged against the relator which could amount to inability or misbehaviour?] The question is, how the fact is to be determined. In *Regina v. Owen*, 15 Q. B. 485 (E. C. L. R. vol. 69), Erle, J., said: "The county court judge has power to dismiss his clerk for inability; and the clerk, if he is dismissed on that ground, has a right to raise the question whether the fact of such inability exists; and, when that question is raised, it is for the jury to decide it." [Lord CAMPBELL, C. J.—That was said after the information had issued, and the special verdict had been returned. It is probable that the affidavits on which the rule was granted showed a charge

amounting to what the jury found. PATTESON, J.—*On the argument upon the rule for a quo warranto it was conceded that [188 the sole ground was the insolvency. Lord CAMPBELL, C. J.—And without some such admission or proof there could have been no rule.] The letter accompanying the delivery of the dismissal here showed that the Chancellor did not himself consider that a strong case was made out.

Another ground for the application is that the cases adduced on the inquiry were very numerous and embarrassing. [Lord CAMPBELL, C. J.—Does it appear that Mr. Ramshay applied for further time?] That is not sworn. But the main complaint was originally the fining of Mr. Whitty; while, at the hearing, numerous other complaints were adduced.

Further, at the close of the inquiry, the proper course would have been to call on Mr. Ramshay to show cause why he should not be dismissed. *Ex parte* Kinning, 4 Com. B. 507 (E. C. L. R. vol. 56), (a) shows that this step should have been taken after the determination on the facts. But it appears that the Chancellor executed the instrument of dismissal without any communication or notice to Mr. Ramshay, in a very few days after the inquiry. *Cur. adv. vult.*

Lord CAMPBELL, C. J., in this vacation (February 10th), delivered the judgment of the Court. After stating the nature of the application against Mr. Pollock, his Lordship said:

The ground of the application is that, when he was appointed to the office, it was not vacant, William Ramshay, Esq., who before filled it, not having been lawfully removed from it. The question which we *have to consider therefore is, whether, upon the affidavits laid [189 before us, Mr. Ramshay is entitled to question the legality of his removal in a quo warranto against his successor.

This depends upon the true construction of stat. 9 & 10 Vict. c. 95, s. 18, whereby it is enacted: "That it shall be lawful for the said Lord Chancellor, or, where the whole of the district is within the Duchy of Lancaster, for the Chancellor of the said Duchy, if he shall think fit, to remove for inability or misbehaviour any such judge already appointed or hereafter to be appointed."

By a formal instrument under the hand and seal of George William Frederick, Earl of Carlisle, Chancellor of the Duchy of Lancaster, within which the whole of the district of this county court lies, Mr. Ramshay, before the appointment of Mr. Pollock, was removed for inability and misbehaviour.

We are of opinion that this instrument is not absolutely conclusive; that the Chancellor, in the exercise of the authority to dismiss from the office, is in the language of the Judges in *Rex v. Warren*, 1 Cowp. 370, "subject to the control of this Court," and that (as is there said) we may inquire into the cause and manner of amotion. We cannot

(a) See *Bonaker v. Evans*, 16 Q. B. 162 (E. C. L. R. vol. 71).

insist that the instrument of removal shall set out all the proceedings instituted in order to the removal, with the specific charges showing inability or misbehaviour, or the evidence adduced to support these charges. The instrument being drawn up in the words of the Act of parliament, we may presume that the Chancellor has duly exercised his jurisdiction till the contrary is proved. But we think that it would have been open to Mr. Ramshay to show that he was removed *without notice of any charges against him, or without an opportunity of being heard in his defence, or that no evidence was adduced to support the charges, or that the complaints against him were not for inability or misbehaviour in his office, and were of such a nature that, if proved or admitted, they could not disqualify him for his office, or amount to *inability* or *misbehaviour*, within the meaning of the Act of parliament. Upon such affidavits, we think that we should have been bound to grant a rule to show cause for a quo warranto, with a view to his being afterwards restored to his office from which he had been illegally removed. We are to see that judges and functionaries vested with judicial authority do not exceed their jurisdiction. The Chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused: he cannot legally act upon such an occasion without some evidence being adduced to support the charges; and he has no authority to remove for matters unconnected with inability or misbehaviour in the office of county court judge. Where the party complained against has had a fair opportunity of being heard, where the charges, if true, amount to inability or misbehaviour, and where evidence has been given in support of them, we think we cannot inquire into the amount of evidence or the balance of evidence, the Chancellor, acting within his jurisdiction, being the constituted judge upon this subject.

Looking to the affidavits on which this motion was made, they appear to us to be insufficient to rebut the presumption that the removal was regular and rightful. The affidavits very strongly assert Mr. Ramshay's uniform good conduct as a judge, as well as his ability; *and they *191] particularly seek to justify his conduct on some occasions when he was supposed to have acted improperly, as in fining the editor of a newspaper for a contempt of court. But Mr. Ramshay does not say that grave charges of misbehaviour as a judge were not brought against him, or that he had no notice of these charges, or that he had not a fair opportunity of being heard upon them, or that evidence was not adduced to support them. Consistently with these affidavits, the proceedings may have been regularly conducted; and there may have been evidence before Lord Carlisle sufficient to support the charges and to warrant the judgment.

Sir Fitzroy Kelly contended that, upon the just construction of the

statute, this Court is bound to grant a quo warranto so that the merits of the case may be ultimately determined by a jury. But we are of opinion that, when the Chancellor has duly acted within his jurisdiction in the exercise of this authority, giving notice to the party accused of the charges against him, those charges, if true, amounting to inability or misbehaviour in his office, inquiring by evidence into the truth of the charges, and hearing the party accused, the Legislature intended that the Chancellor's sentence of removal should be final and conclusive.

Much stress has been laid upon the hardship which, from this construction of the statute, would arise to county court judges, who certainly fill an office of great dignity and importance in the administration of justice. But such a topic can only be legitimately used to assist us in getting at the real meaning of the Legislature: when that is ascertained, we are not at liberty to be governed by any opinion which we may entertain as to the policy or even the justice of the enactment.

*But it may not be very improbable that the Legislature, [192 amidst a choice of difficulties, intended to confer this power of removal, without an appeal to a jury, upon the Lord Chancellor or the Chancellor of the Duchy of Lancaster. These are high functionaries under the Crown, and directly responsible to Parliament for the due exercise of the authority committed to them. There must be a power lodged somewhere of removing county court judges, both for inability and misbehaviour. Practically, this power could hardly be exercised by the Crown on the address of the two Houses of Parliament, according to the course prescribed for the removal of the Judges of the superior courts in Westminster Hall. Is the appeal to a jury, which it is supposed that the Legislature must have contemplated, altogether free from inconvenience? With all due deference for juries in the exercise of their proper functions, the Legislature may have thought that the Lord High Chancellor of Great Britain or the Chancellor of the Duchy of Lancaster is likely to form quite as impartial and enlightened an opinion, after hearing evidence on the subject, as to the ability and behaviour of a judge in his office.

Nor can we overlook the obstruction which would arise to the administration of justice in the country from the doctrine contended for. If, upon a removal after an inquiry duly conducted, the appointment of a successor may be questioned in a quo warranto, then, in every case in which affidavits can be obtained denying the charges and falsifying the evidence by which they were supported, a quo warranto may go; unseemly struggles may arise between the two claimants to the office in the discharge of its duties; and questions may be made whether all the proceedings in the court for many months are not *coram non judice*.

*But, after all, we must look to the language which the Legislature has employed, and put upon it its natural and grammatical [193 meaning, nothing appearing to show that it is used in any extraordinary

sense. "It shall be lawful for the said Lord Chancellor," "if he shall think fit, to remove for inability or misbehaviour any such judge." Is not the natural and grammatical meaning of this language that, if the Chancellor proceeds duly, he may without appeal remove for inability or misbehaviour, and that, having heard evidence, *he* is to determine whether the inability or misbehaviour is made out. He is clearly constituted judge of the inability or misbehaviour in the first instance; and, if no appeal is given expressly or impliedly, his judgment must be final. No appeal is expressly given; and to imply an appeal, we think, would be to legislate, not to construe the language of the Legislature.

Sir *Fitzroy Kelly* relied much on *Regina v. Owen*, 15 Q. B. 476 (E. C. L. R. vol. 69). But, when this case is examined, it will be found to be no authority in his favour. Although it proceeds on sect. 24 of the Act, respecting the removal of a clerk by a judge, it would have been strongly in point if the quo warranto had been there granted after the judge had objected to the clerk charges which, if true, proved inability or misconduct, and, after due inquiry, and giving the clerk an opportunity of being heard, had dismissed the clerk upon the ground that the charges were substantiated. But, on inquiring what took place when the quo warranto was granted, we find that it was made out to the Court that, instead of misbehaviour being imputed to the clerk, it was admitted that he had always performed the duties of his office *unex-
 *194] ceptionably; and the only *inability* imputed was an inability to pay all his debts, without any suggestion that this had affected his mind or in any degree disabled him from doing the duties of clerk. Therefore there was no imputation of inability or misbehaviour in his office; and, admitting the truth of all that was imputed, no inability or misbehaviour in his office appeared. When the special verdict was argued, no question arose as to the right to the quo warranto; and the observations of the learned Judges then made must be taken with reference to the facts and points then before the Court.

Sir *Fitzroy Kelly* likewise relied upon a class of cases respecting the removal of a parish clerk by the incumbent. But, supposing that the Chancellor here has only the same power of removing the county court judge which the incumbent has of removing the clerk at common law, no case has been cited where, the incumbent having proceeded regularly against the parish clerk, bringing charges against him of misbehaviour in his office, giving him notice of these charges, and having, after hearing evidence to substantiate them and hearing the defence, dismissed the clerk on the ground that the charges were proved, this Court interfered to restore him by mandamus, on affidavits that he was innocent, and that the evidence against him was false. The case of *Rex v. Warren*, 1 Cowp. 370, which was mainly relied upon, is not by any means to this effect. The report is short and unsatisfactory: but the rule to show cause seems to have been granted on the ground that the

clerk was in prison when he was removed, so that he could not have been heard in his defence; that he had appointed a deputy; and that no misconduct in his office had been imputed to him. When cause was shown, the *Court said: "There is no sufficient reason assigned in the affidavits that have been read, upon which the Court can [*195 exercise their judgment; nor is there any instance produced of any misbehaviour of consequence." Therefore, supposing that the clerk had been heard in this case, as in *Regina v. Owen*, 15 Q. B. 476 (E. C. L. R. vol. 69), no inability or misbehaviour in the office was imputed, and the incumbent had no authority to remove. Lord Mansfield there uses the expression, which we adopt: "he can never be the sole judge and remove him *ad libitum*; without being subject to the control of this Court." The Court may inquire into the cause and manner of amotion. But, from the language of the Judges, and the course of the proceeding, there can be little doubt that, if the affidavits had shown that acts of misconduct in his office were imputed to the clerk, that he had been heard upon them, and that the incumbent proceeded on the belief of evidence in support of the charges, the rule never would have been granted, however numerous or strong might have been the affidavits to show that the clerk was innocent.

We are, therefore, of opinion that the construction of the Act of parliament contended for neither rests on principle nor on authority, and that, unless some defect is pointed out in the manner in which the proceedings were conducted in this case, we are not entitled to interfere.

Sir Fitzroy Kelly complained that, the charges having originated in a memorial of a society at Liverpool called the Guardian Society for misconduct in fining a person of the name of Whitty for a supposed insult to the judge, other charges not contained in the memorial were afterwards brought forward. But such an *inquiry is to be con- [*196 ducted according to the substantial rules of justice, not according to the technical rules of special pleading. It is conducted as an inquiry before the Benchers of an Inn of Court into charges upon which a barrister may be disbarred, and can be conducted in no other way, the Legislature not having prescribed any formalities, and not having conferred the power of administering an oath. It is not alleged by Mr. Ramshay that he was not fully heard on all the charges brought against him.

Complaint is next made of the time which elapsed between the close of the inquiry and the sentence of removal, and that no further notice was given to Mr. Ramshay to show cause why he should not be removed: but the fair inference from the affidavits is that the inquiry was known to all parties to be finally closed, and that the Chancellor of the Duchy only took time deliberately to consider the evidence, and to consider of his judgment.

Last of all, it is said that this solemn judgment under his hand and seal is vitiated by a private letter of the same date written by Lord Carlisle to Mr. Ramshay. But, although a general liberty is given to Mr. Ramshay to make what use of it he pleased, one can hardly think that this extended to the use of it in a Court of justice for the purpose of nullifying the dismissal. It was evidently written with a view of softening, as much as possible, the pain to be inflicted in the discharge of a public duty: and the sentiments there expressed are perfectly consistent with the tenor of the sentence of removal; for it is possible that a man may have valuable qualities and may be amiable in private life, and yet may be justly removed for inability and misbehaviour as a Judge.

Rule refused.

*197] *DOE, on the demise of THOMAS HENRY EVERS and
MARY ANN, his Wife, v. WILLIAM WARD and Others.
[Jan. 30, 1852.]

Devise:

I give to my son, J. D., during his natural life, nine freehold houses, &c.; and, from and after his decease, I give the said houses unto his children, &c. (if sons, on their attaining the age of 23, if daughters, of 21), their heirs, &c., as tenants in common; and, in case he has only one child, to such one child (on attaining age, as before), his or her heirs, &c. And, in case all the children of my said son shall die under the age, &c. (as before), then I give the before-mentioned premises to my daughters, S., A. and E. M., during their respective natural lives, in equal shares; and, upon the decease of my said three daughters, the share of each of them so dying unto her children, &c., their heirs, &c., or child, &c. (with provision as to age as before); and, in case of the death of any of my said daughters without having a son who shall attain, &c., or a daughter who shall attain, &c. (the specified ages), I give such share as such child or children would have had to the child or children of my other two daughters, in equal shares, their heirs, &c.: and, if only one daughter leaves issue that shall attain, &c., then the whole of the said premises to such issue, if more than one, in equal shares, as tenants in common, &c., their heirs, &c.; if only one, to such one, &c.

Codicil:

I hereby revoke that part of my will whereby I give nine freehold houses, &c., to my son J. D. and his heirs, and my will is that my daughters A. and E. M. should enjoy them. I hereby give the said freehold houses to my said daughters A. and E. M. equally and jointly between them, and to the survivor of them, and, after their decease, to their child or children equally, and, if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will. A. and E. M. died, leaving no issue. A son of J. D. and children of S., the third sister, survived.

Held that the codicil did not entirely revoke the devise to J. D., but only postponed him to the two sisters, A. and E. M., and that, on the decease of both without issue, he, and not the children of S., became entitled; and that, if the devise to J. D. had been revoked by the codicil, the children of S. could not take under the will, because the contingency on which she was to take according to the devise had not happened.

EJECTMENT for two undivided third parts or shares of freehold houses numbered 1 to 9 in Angel Court, Grub Street, in the parish of St. Giles without Cripplegate, in the city of London; also for one freehold house in Grub Street aforesaid, the corner of Phillips Court, and the whole of Phillips Court in the said parish, being the freehold houses mentioned, among others, in the devise to John Dolley, and in the

codicil, hereinafter set forth. Issue being joined, a special case was stated, by consent and the order of a Judge, for the opinion of this Court. The following facts appeared by the case.

*Thomas Dolley, being seised in fee of certain freehold and possessed of certain leasehold premises and personal estate, made [198 his will and codicil, respectively bearing date 12th June, 1819, and 20th March, 1820. The material parts of the will were as follows.(a)

The last will and testament of me, Thomas Dolley, of Redcross Street, Cripplegate, London, Gentleman I give the whole of the income of my property, real and personal, unto Thomas Challis, of, &c., and John Brogde, of, &c., during the period and for the purposes hereinafter mentioned, that is to say: Upon trust to receive such income, and pay unto each of my five children the sum of 50*l.* (the payments to daughters to be in exclusion of their husbands). I give to the said T. C. and J. B., my executors and trustees, the sum of 5000*l.* Bank 3*l.* 10*s.* per Cent. Annuities, upon trust to receive and pay, &c.: payment to be made to testator's daughter Margaret Creswell White during her life, independently of her husband; after her decease the principal to be divided equally among all testator's other children living at her decease, and, in case of the death of any such child in the lifetime of Margaret, leaving issue, his or her share to go to such issue or such of them as should attain 21; the shares of females to be paid to their sole uses. The testator then left certain small annuities out of personalty and realty to his sisters Ann Gwillim and Elizabeth Jarvis and his servant Elizabeth Slater, with benefit of survivorship among them, and with reversionary interests to the testator's youngest daughters Ann and Elizabeth Maria in equal shares: also legacies of 1000*l.* to each of the two last-mentioned daughters.

*"And, so subjecting all my real and personal estate for the purposes aforesaid and for other the purposes herein, I give to [199 my son John Dolley during his natural life my four freehold houses on the West side of Reynolds Court, numbers 1, 2, 3, and 4," "likewise a freehold house No. 16 in the said court, nine freehold houses, 1, 2, 3, 4, 5, 6, 7, 8, and 9 in Angel Court, Grub Street aforesaid, one freehold house numbered 188 in High Holborn in the county of Middlesex, seven leasehold houses in Grub Street, and two in Bell Court, Grub Street, and one other leasehold house in Grub Street, and also nine leasehold houses in Hanover Court, Grub Street, and all my fifteen leasehold houses in Sun Court, Grub Street, all in the parish of Cripplegate, London, with all rights and appurtenances to the said several houses belonging:" "likewise all the land tax," &c. (land tax on various properties, redeemed by the testator). "And, from and after the decease of my son, I give all the before-mentioned freehold

(a) It has been thought advisable to set out here as much of the will as is material to the following as well as to the present case.

and leasehold houses, land tax and premises aforesaid unto his children now born or hereafter to be born, if a son or sons, that shall live to the age of 23 years, and if a daughter or daughters, that shall live to the age of 21 years, their respective heirs, executors, administrators, and assigns, according to the nature or tenure thereof, as tenants in common. And, in case of the death of any child or children, if a son or sons, under the age of 23 years, and, if a daughter or daughters, under the age of 21 years, the share and shares of all such child or children so dying shall go to the survivors and survivor of them, sons and daughters, attaining the said age of 23 or 21 years, their heirs, executors, administrators, and assigns in equal share: and, in case my said *200] son has only one *child, if a son, that shall live to the age of 23 years, or, if a daughter, that shall live to the age of 21 years, I give all the before-mentioned premises, shares, and land tax, unto such only child so attaining such age, his or her heirs, executors, administrators, and assigns: And, further, in case all the children of my said son, if a son or sons, shall die under the age of 23 years, or, if a daughter or daughters, shall die under the age of 21 years, then I give all the before-mentioned freehold and leasehold premises, shares, and land tax, unto the said T. C. and J. B., their heirs, executors, and administrators, during the respective lives of my daughters Sarah Ward, Ann Dolley, and Elizabeth Maria Dolley, upon trust to pay, or permit my said daughters to receive and take, the rents, profits," &c., "for and during their respective natural lives, in equal shares" (and independently of husbands), "if my estate in the leasehold part so long continues. And, upon the decease of my said three daughters, I give the share of each of them so dying unto her children, if a son or sons, living to the age of 23 years, if a daughter or daughters, living to the age of 21 years, his, her, and their heirs, executors, administrators, and assigns, if more than one, in equal shares, and, if only one child, to such only child, if a son, at 23, and if a daughter, at 21, his, her, or their heirs, executors, administrators, and assigns. And, further, in case of the death of any one or more of my said daughters without having a son who shall live to the age of 23 years, or a daughter who shall live to attain the age of 21 years, I give such part and parts such children or child would have had and be entitled to as aforesaid unto the child or children of my said daughter having issue living, if a son or sons, to the age *201] of 23 years, or, a *daughter or daughters, to attain the age of 21 years: if two daughters have such children or child, to them, her, or him as taking in equal shares from his, her, or their mother, his, her, or their heirs, executors, administrators, and assigns: and, if only one of my said daughters leaves issue that lives to attain the ages aforesaid, then I give the whole of such freehold and leasehold premises and land tax unto such issue, if more than one, in equal shares, as tenants in common, their heirs, executors, administrators. and assigns,

and if only one, to such one, his or her heirs, executors, administrators, and assigns."

The testator then ordered that the rents, profits, &c., of the said premises should (subject as aforesaid), after all necessary outgoings for repairs and insurance, be received by such person as testator's said son should appoint, and be applied for the maintenance of the children or child of testator's said son, or of testator's said three daughters, during their respective minorities, or until they became entitled as aforesaid; but, if no direction, as testator's executors and trustees might think proper for that or other purposes.

"I give to the said Thomas Challis and John Brogden, all those my five freehold houses in Harp Court, Nos.," &c., "nine freehold houses in Black Horse Court, Nos.," &c., "all in the parish of Saint Bride otherwise Saint Bridget, Fleet Street, London, and my leasehold house No. 3 Crane Court, Fleet Street, London, with all rights and appurtenances to the said last-mentioned houses belonging; also ten shares in the Eagle Insurance, London; to hold all the said last mentioned freehold and leasehold premises and Eagle insurance shares unto the said T. C. and J. B., their heirs, executors, administrators, and assigns, according to the nature thereof respectively, during the natural life of my said daughter Sarah Ward, *upon trust that they my said trustees, or the survivor of them, his heirs, executors, and admin- [*202 istrators, do pay, or permit my said daughter Sarah Ward from the quarter day next after my decease to receive and take, the rents, issues, and annual profits thereof respectively for and during the term of her life, to and for her own sole and separate use only, independent of the debts, control, or engagements of her present or any future husband, if my estate and interest in the leasehold part so long continue." "And, from and after the decease of my said daughter Sarah Ward, I give the said last-mentioned freehold and leasehold premises and Eagle shares unto such of her children as she now has or may have, if a son or sons at his or their age or ages of 23 years, and if a daughter or daughters at her or their age or ages of 21 years, their respective heirs, executors, administrators, and assigns, according to the nature thereof, as tenants in common. And, in case of the death of any child or children of her my said daughter, if a son or sons under the age of 23 years, and a daughter or daughters under the age of 21 years, the share or shares of each such child, son or daughter, so dying, to go to the survivors or survivor of such child and children, being a son or sons, on his or their attaining the said age of 23 years, and, if a daughter or daughters, on her or their attaining the age of 21 years, and their heirs, executors, administrators, and assigns, in equal shares as tenants in common. And, in case my said last-named daughter has only one child, if a son, that shall live to the age of 23 years, and, if a daughter, that shall live to the age of 21 years, I give all the said last-mentioned pre-

mises and Eagle shares unto such only child so attaining such age, his or her heirs, executors, administrators, and assigns for ever, or during *203] *my estate in the leasehold part, and direct that the rents, issues, interest and annual produce thereof shall, until my said grandchildren attain such ages as aforesaid, be paid and applied for or towards their maintenance and education. And, further, in case all the children of my said daughter Sarah, if a son or sons, shall die under the age of 23 years, or, if a daughter or daughters, shall die under the age of 21 years, then I give all the said last-mentioned premises and Eagle shares unto the said T. C. and J. B., their heirs, executors, and administrators, during the respective lives of my said son John Dolley, and daughters Ann Dolley and Elizabeth Maria Dolley, upon trust to pay, or permit my said son and two daughters to receive and take the rents, profits, interest, or other the annual income thereof, for and during their respective natural lives, in equal shares, the shares of my said daughters to be for their separate uses only, and independent of any husband or husbands, if my estate in the leasehold part so long continue. And, upon the decease of my said son and two daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to the age of 23 years, and, if a daughter or daughters, living to the age of 21 years, his, her or their heirs, executors, administrators, and assigns, if more than one in equal shares, and, if only one child, to such only child, his or her heirs, executors, administrators, and assigns. And, further, in case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to the age of 23 years, or, if a daughter or daughters, who shall live to attain the age of 21 years, I give the part and parts such child or children, sons or daughters, would have had and been entitled unto as aforesaid unto *204] the child or children of my said son and two daughters *having issue, son or sons, daughter or daughters, living to attain the ages aforesaid; if two of my said last-named children have such children or child, to them, her or him as taking in equal shares from his, her, or their father or mother, his, her, or their heirs, executors, administrators, and assigns; and, if only one of them my said son and two daughters leaves issue that lives to attain the age or ages aforesaid, then I give the whole of such freehold and leasehold premises and Eagle shares unto such issue, if more than one, in equal shares, their heirs, executors, administrators, and assigns, as tenants in common: and, if only one, to such one, his or her heirs, executors, administrators, and assigns. And it is also my will that the rents, profits, and interest of the said last-mentioned premises and share shall, after all necessary outgoings for repairs, ground-rent, and insurance, be applied for and towards the maintenance of the children of my said daughter Sarah, or of my said son and two other daughters' children until they become respectively interested as before mentioned.

"I give to the said T. C. and J. B. all those my two freehold houses numbered 11 and 12, situate on the west side of Vere Street, Clare Market, in the county of Middlesex, seven freehold houses in Reynold's Court, Nos. 5, 6, 7, 8, 9, 10, and 11, three houses adjoining in Butler's Alley, Nos. 11, 12, and 13, all my four freehold houses in Sea Coal Lane, Skinner Street, in the parish of Saint Sepulchre, London, Nos. 18, 19, 20, and 21, three freehold houses and premises in Surrey Place, Cow Lane, Queen Street, Rotherhithe, in the county of Surrey, and one leasehold house in Winkworth Buildings, City Road, with all rights and appurtenances to the said last-mentioned houses and premises belonging, likewise all the land tax on the last-mentioned estates redeemed by me, and ten *shares in the Eagle insurance, to hold [*205 all the said last-mentioned premises, land tax and shares, unto the said T. C. and J. B., their heirs, executors, administrators, and assigns, according to the tenure thereof, during the natural life of my daughter Ann Dolley, upon trust that they the said T. C. and J. B. and the survivor of them do pay, or permit my said daughter Ann from the quarter day next after my decease to receive and take, the rents and profits of all the last-mentioned freehold and leasehold premises, land tax, and Eagle shares, for and during the term of her natural life, to and for her own sole and separate use and benefit only, independent of the debts, control, or engagements of any husband or husbands with whom she may marry. And, from and immediately after the decease of my said daughter Ann, I give the said last-mentioned premises unto such child or children as she may have" (attaining 23, if son or sons, 21, if daughter or daughters, as before), "their respective heirs, executors, administrators, and assigns, as tenants in common: and, in case of the death of any child or children of her my said daughter Ann," if son or sons, under 23, if daughter or daughters, under 21, "the share or shares of each child or children dying under such ages to go to the survivors and survivor of such child and children attaining the said age or ages, their heirs, executors, administrators, and assigns, in equal shares as tenants in common. And, in case my said daughter Ann has only one child," attaining 23, if a son, or 21, if a daughter, "I give all the said last-mentioned premises unto such only child, if a son, at his age of 23 years, or, if a daughter, at her age of 21 years, his or her heirs, executors, administrators, and assigns. And, further, in case my said daughter Ann shall die without issue, or in case all the children which my said daughter may have shall die," *if sons, under 23, if [*206 daughters, under 21, "then I give all the said last-mentioned premises unto the said T. C. and J. B., their heirs, executors, administrators, and assigns during the respective lives of my said son John Dolley and daughters Sarah Ward and Elizabeth Maria Dolley, upon trust to pay, or permit my said son and two last-named daughters to receive and take, the rents, profits, and annual income thereof for and

during their respective natural lives in equal shares, the share of my said two daughters to be for their respective uses only and independent of any husband or husbands. And, upon the decease of my said son and two last-named daughters, I give the share of such of them so dying unto his or her children," if son or sons at 23, if daughter or daughters at 21, "his, her, and their heirs, executors, administrators, and assigns, if more than one in equal shares as tenants in common, and, if only one child, to such only child, if a son," at 23, if a daughter, at 21, "his or her heirs, executors, administrators, and assigns. And, further, in case of the death of my said son or either of my said two daughters without leaving a child who shall live to attain the ages aforesaid, I give the part and parts such children or child would have had and been entitled unto as aforesaid unto the child or children of my said son and two daughters having issue living, if a son, to attain" 23, or a daughter, 21; "if two of my said last-named children have such children or child, to them, her, or him, their, his, or her heirs, executors, administrators, and assigns, as taking equal shares from his or her father or mother, his, her, and their heirs, executors, administrators, and assigns: and, if only one of them my said son and two daughters leaves issue, if a son that lives to" 23, or, if a daughter, to 21, "then I give the whole of such last-mentioned estate and premises unto *such issue, if more than one, *207] in equal shares, their respective heirs, executors, administrators, and assigns, as tenants in common: and, if only one, his or her heirs, executors, administrators, and assigns. And it is my will that the rents and profits of the last-mentioned premises shall, after all necessary outgoings for repairs and insurance, be applied for or towards the maintenance of the children of my said daughter Ann, or of my said son and two other daughters' children, until they become entitled to the principal and estates last mentioned.

"I likewise give to the said T. C. and J. B. all those my four other freehold houses in Sea Coal Lane, Skinner Street, aforesaid, numbers 22, 23, 24, and 25, all those six freehold houses in Dolley's Place, Rope-maker's Street, Nos. 1, 2, 3, 4, 5, and 6, three freehold houses on the East side of Reynold's Court, numbers 16, 17, and 18," &c. (paying a moiety of certain expenses of repairs, &c.): "and I do hereby subject and charge the last-mentioned nine houses with the payment of such moiety of the said expenses accordingly: and one freehold house behind Mr. Pocock's dwelling, all in the said parish of Saint Giles Cripplegate; also one freehold house in Tash Court in the parish of St. Andrew Holborn, with redemption of land tax; likewise my leasehold house and premises at Chinkford in the parish of Walthamstow; with all rights and appurtenances to the said last-mentioned houses belonging; and one share in The Imperial Insurance, London: To hold all the said last-mentioned houses, shares, and premises unto the said T. C. and J. B., their heirs, executors, administrators, and assigns, during the natural life of

my daughter Elizabeth Maria Dolley, upon trust that they, the said T. C. and J. B., and the survivor of them, and his heirs, executors, or administrators, do pay, or permit my daughter the said *Elizabeth Maria, from the quarter day next after my decease, to receive [*208 and take, the rents and profits of the said last-mentioned premises and share for and during the term of her natural life" (independently of any husband, &c.; her receipt alone to be a discharge): "And, from and immediately after the decease of my said daughter Elizabeth Maria, I give all the said last-mentioned premises and share unto such of her children as she may have, if a son or sons, who shall live to the age of 23 years, and, if a daughter or daughters, who shall live to the age of 21 years, their respective heirs, executors, administrators, and assigns, as tenants in common: And, in case of the death of any child or children which my said daughter Elizabeth Maria may have, if a son or sons, under the age or ages of 23 years, or, if a daughter or daughters, under the age of 21 years, the share or shares of such child or children so dying to go to the survivors and survivor of such child and children attaining such ages, if more than one, their heirs, executors, administrators, and assigns, in equal shares as tenants in common; and, in case my said daughter Elizabeth Maria has only one child, if a son, that shall live to the age of 23 years, or, if a daughter, that shall live to the age of 21 years, I give all the said last-mentioned premises unto such only child so attaining such age, his or her heirs, executors, administrators, and assigns. And also, in case all the children of my said daughter Elizabeth Maria shall die, if a son or sons, under the age of 23 years, or, if a daughter, under the age of 21 years, or if she has none, I give all the said last-mentioned premises unto the said T. C. and J. B., their heirs, executors, and administrators, during the respective lives of my said son John Dolley and daughters Sarah Ward and Ann Dolley, upon trust to pay, or *permit my said son and two last-named daughters to receive and take, the rents, profits, and annual income thereof for [*209 and during their respective natural lives in equal shares, the shares of my said two daughters to be for their separate uses only and independent of any husband or husbands: and, upon the decease of my said son and two last-named daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to attain the age of 23 years, and, if a daughter or daughters, living to the age of 21 years, his, her, and their heirs, executors, administrators, and assigns, if more than one, in equal shares as tenants in common, and, if only one child, to such only child, his or her heirs, executors, administrators, and assigns. And, further, in case of the death of my said son or either of my said two daughters, without leaving a child, if a son, who shall live to attain the age of 23 years, or, if a daughter, who shall live to attain the age of 21 years, I give the part and parts such children or child would be entitled to as aforesaid unto the child or children of my said son and two daugh-

ters having issue, if a son or sons, living to the age of 23 years, and, if a daughter or daughters, living to attain the age of 21 years; if two of my said last-named children have such children or child, to them, his, or her heirs, executors, administrators, and assigns, as taking in equal shares from his or her father or mother, his, her, and their heirs, executors, administrators, and assigns; and, if only one of them, my said son and two daughters, leaves issue that lives, if a son or sons, to the age of 23 years, if a daughter or daughters, lives to attain the age of 21 years, then I give the whole of such last-mentioned estate and premises *210] unto *such issue, if more than one, in equal shares, their respective heirs, executors, administrators, and assigns; and, if only one, to such one, his or her heirs, executors, administrators, and assigns, at the ages aforesaid. And it is my desire that the rents, produce, and profits of the said last-mentioned premises shall, after all deductions for the purposes aforesaid, be applied for or towards the maintenance and education of the children of my said daughter Elizabeth Maria, and of my said son and two other daughters' children, until entitled to the said estates and premises.

"I give unto the said T. C. and J. B., their executors, administrators, and assigns, all such other leasehold messuages and estates as I may be possessed of or entitled unto at my decease, save and except my dwelling-house in Red Cross Street, upon trust that they or the survivors or survivor of them, his executors or administrators, do and shall receive the rents or other the annual produce thereof during the terms in the leases under which I may hold the same, and, after paying the rents reserved by such leases, and performing the covenants contained therein respectively for repairs and insurance, or otherwise from time to time after answering the purposes of this my will, to pay the net produce of such rents and profits unto and equally amongst my son John Dolley, daughters Sarah Ward, Ann Dolley, and Elizabeth Maria Dolley, during their respective lives, the shares of my said daughters to be paid to them on their receipts only for their sole and separate uses, independent of the debts," &c., "of any husband:" "and, upon the decease of my said son and four daughters or any of them, I give the interest and also the principal unto and for the use and benefit of my said five children and *211] surviving children and their *children, such children taking as and from their father and mother, with such restrictions as to my said daughters, with all such and the like benefit of survivorship and other accruer unto and amongst all my children and their children at such ages and times, with maintenance, as before mentioned with respect to the specific property hereinbefore by me given unto or in trust for my said son and three last-named daughters, Sarah Ward, Ann Dolley, and Elizabeth Maria Dolley, and their issue, with remainder over as aforesaid."

(Then followed a bequest of a leasehold house at Hoxton in trust for

testator's grandson, William Ward, and, in case of his death under 23, for his eldest brother or sister first attaining that age, his or her executors, &c. : and, after some other bequests of personalty, and directions, the will proceeded :))

"I give to my said two unmarried daughters my present dwelling-house in Red Cross Street, to hold to them, their executors, administrators, and assigns, for all such term and estate as I may have therein at my decease, they paying the rent and performing the covenants mentioned in the lease under which I hold or may hold the same from the end of the quarter day next after my decease, until which period I direct all rent, taxes, and other outgoings shall be paid out of my general personal estate. And I likewise give to them my said two unmarried daughters, in equal shares, all the household furniture, plate, linen, china, glass, and every other thing in my said house belonging to me, except money and securities for money, or what may belong to other property. And it is my will and desire that all other the residue of my personal property may be sold or otherwise converted into money by my said executors as soon as may be after my decease, and that the money, *as the same shall be received, or so much as may be [*212 necessary, be, in the first place, with other my property, paid, applied, and laid out for or towards the general uses and purposes of this my will : and in the first place" for payment of certain pecuniary legacies to testator's grandchildren on attaining, respectively, 23 and 21, or on marriage, and of certain sums in the mean-time for maintenance, education, &c. ; with a bequest of the remainder of such residue to the testator's son and his daughters Sarah, Ann, and Elizabeth Maria, in case of the deaths of grandchildren.

"And, in case of the death of all my grandchildren now born or hereafter to be born, if a son or sons," under 23, or, if a daughter or daughters, under 21, "without leaving any child or children them or any of them surviving, I give all my freehold and leasehold estates and other property, hereinbefore by me given in trust or for the use and benefit of my said five children for their respective lives with remainders over as before mentioned, unto and equally amongst all the children of my said sister, Ann Gwillin, living at my decease, their respective heirs, executors, administrators, and assigns, according to the nature and tenure thereof, as tenants in common."

Then followed certain leasing powers and other provisions, which it is unnecessary to state.

There was a codicil as follows :

"This first revocation and codicil to my last will and testament, made this day and dated underneath, is as follows. I revoke that part of my will whereby I give to my daughter, Margaret Creswell White, the dividends of 5000*l.* 8½ per cent. annuities ; and instead thereof I give her the said M. C. W. the interest or dividends arising from 7000*l.* 8 per

cent. annuities, to be paid to her only every half year during her natural life by my *trustees named in my said will; and at her decease *213] the principal to be divided as directed by my last will.

"I likewise hereby revoke that part of my last will and testament whereby I give one freehold house, No. 188, High Holborn, and likewise nine freehold houses in Angel Court, Grub Street, in the city of London, unto my son John Dolley and to his heirs: And my will is that my daughters Ann Dolley and Elizabeth Maria Dolley should enjoy them. I hereby give and bequeath the said freehold ground and houses, together with one freehold house in Grub Street aforesaid, the corner of Phillip Court, and the whole of Phillip Court, lately agreed for to be purchased of Mrs. Cipriana and her trustees, to my said daughters Ann Dolley and Elizabeth Maria Dolley, equally and jointly between them, and to the survivor of them; and, after their decease, to their child or children equally; and, if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will. And further it is my will that, if I die before my agreement is fulfilled and the estate paid for, and likewise the nine houses now agreed to be built in Angel Court are paid for, the said estate and buildings and repairs wanted in Phillip's Court are paid for, the same shall all be paid for and completed before any division of my personal estate takes place, and all the expenses thereof shall be paid out of my personal estate. I give these estates to my said daughters for their use only, not subject to the debts or control of any husband or husbands they hereafter may marry. THOS. DOLLEY. Signed this 20th day of March, 1820, by me," &c.

\ The said Thomas Dolley died seised and possessed of the premises *214] and personal estate in the will and codicil *respectively mentioned, on 26th March, 1821, without altering or revoking the said will and codicil, except so far as the will was altered or revoked by the codicil.

The freehold houses mentioned in the codicil to have been agreed to be purchased of Mrs. Cipriana and her trustees were, in the lifetime of the said Thomas Dolley, conveyed to him in fee; and he died seised thereof.

At the date of the will and codicil, and at the time of the death of the said Thomas Dolley, he had one son, the said John Dolley, and four daughters, viz. the said Ann Dolley, Elizabeth Maria Dolley, Sarah Ward, and Margaret Creswell White.

The said Margaret Creswell White died in 1834. The said Ann Dolley, having married one Isaac Ackerman, died on 31st March, 1847, never having had a child. The said Elizabeth Maria Dolley, having married one Joseph Doxsey, died on 18th August, 1838, never having had a child. The said Sarah Ward died on 27th February, 1830, leaving her surviving three sons and four daughters, viz. William Ward, born in 1804, Thomas Ward, born in 1810, James Ward, born in 1814,

Sarah Ann Ward, born in 1806, Mary Ward, born in 1808, Ellen Jane Ward, born in 1812, and Elizabeth Ward, born in 1821.

Thomas Ward, by his will dated on or about 12th September, 1846,^(a) devised all his real property whatsoever and wheresoever unto and among his sisters, Mary, Ellen Jane, and Elizabeth Ward, as tenants in common in fee, and died in August, 1846.^(a)

Mary Ward married George Verry; Ellen Jane Ward married James Nixon; and Elizabeth Ward married Robert Letchford; which said G. Verry, J. Nixon, and *R. Letchford, together with the said William Ward, are the defendants in this action. [*215]

The said John Dolley, the only son and heir at law of the testator Thomas Dolley, on 25th June, 1806, intermarried with Mary Ann Carr, by whom he had issue Mary Ann Dolley (who was born before the date of the testator's will, viz. on 31st January, 1809), Elizabeth Sarah Dolley, who was born on 26th ^(b) December, 1820, after the date of the codicil but before the death of the said Thomas Dolley, and Clarissa Dolley, who was born on 5th June, 1826, after the death of the testator. The said John Dolley never had any other children.

The said Mary Ann Dolley (the eldest daughter of the said John Dolley, and one of the lessors of the plaintiff), on 21st December, 1834, intermarried with Thomas Henry Evers, one of the lessors of the plaintiff.

The said Elizabeth Sarah Dolley (the second daughter of the said John Dolley), having, on 5th of April, 1848, married George Huddleston, died on 26th April, 1849, leaving her surviving her husband the said George Huddleston and a son George Carr Huddleston, who was born on 21st April, 1849, and died about three months afterwards, viz. on or about 16th July, 1849. The said Clarissa Dolley (the youngest daughter of the said John Dolley) died an infant of the age of two ^(b) years.

The said John Dolley died on 10th October, 1850.

The questions for the opinion of the Court were:

1. Whether, upon the death of Elizabeth Maria Dolley and Ann Dolley, leaving no child or children, any of the freeholds in the introductory part of this case mentioned and alleged to be devised to them by the codicil, passed after the death of the said John Dolley to his children.

*2. Whether the lessors of the plaintiff are entitled to recover the whole or part of the property mentioned in the codicil as purchased of Mrs. Cipriana and her trustees. [*216]

If the Court should be of opinion that any of the said freeholds so devised by the codicil as last aforesaid did so pass, then the verdict was to be entered for the plaintiff for two undivided third parts or shares

(a) See in the Paper Book.

(b) See p. 226, post.

thereof, or for such other proportion thereof as the Court might adjudge to him. As regards the property purchased of Mrs. Cipriana, if the Court should be of opinion that the lessors of the plaintiff are entitled to the whole or any part of it, the verdict to be entered for the plaintiff accordingly. But, if the Court should be of a contrary opinion, then the verdict was to be entered for the defendants.

The case was argued in this term.(a)

Malins, for the plaintiff.—The lessors of the plaintiff are entitled to one moiety of the estates mentioned in the declaration. The devise to John Dolley and his children gave to him a life estate, and to them vested estates in remainder, immediately on the testator's death; Doe dem. *Dolley v. Ward*, 9 A. & E. 582 (E. C. L. R. vol. 36): the question is, what effect the codicil had on those several estates; whether it operated upon them as a partial or as a total revocation. The true construction is, that the testator's daughters Ann and Elizabeth Maria were, for their respective lives only, placed before John, but that, after their deaths, the devise to John and his children took its course. The *217] codicil speaks of a gift made by the will to John Dolley "and to his heirs;" but this is evidently a misrecital of the will, and an erroneous use of the word "heirs" for "children;" and the Court will so understand the expression, as was done in *Wright v. Creber*, 5 B. & C. 866 (E. C. L. R. vol. 11). Even if it should be held that a fee simple in the premises passed to the two daughters by the words "my will is that my daughters should enjoy them," it is immaterial, the daughters having left no issue. There is no objection in principle to a codicil revoking a prior devise partially, and to the extent only of the new interest which is created. The testator's intention seems to have been simply that the two daughters and their children should precede the son, each daughter, and her children after her, taking estates for life, according to Doe dem. *Norris v. Tucker*, 3 B. & Ad. 473 (E. C. L. R. vol. 23). [COLERIDGE, J.—There is not only a change of places, but a general revocation of the gift to John Dolley. Lord CAMPBELL, C. J.—Supposing there had been no express words after the clause "I likewise hereby revoke," &c.: is not the revocation complete?] But the words which follow, "and, if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will," operate as if the devise in the will to John Dolley and his children were again inserted in this place. A similar construction was given to a codicil containing the words "shall go and descend as is by my said will directed," in *Graves v. Hicks*, 5 A. & E. 38 (E. C. L. R. vol. 31). (b) [PATTERSON, J.—If the words of the devise are repeated in the codicil, there is a devise to the daughters Ann and Elizabeth Maria, who are supposed to be dead.] The remainder, after them, would take effect in

(a) January 16th. Before Lord Campbell, C. J., Patterson, Coleridge, and Wightman, J.

(b) See p. 55.

favour of their children. The construction *which must be contended for on the other side would require the codicil to be read [*218 "as ordered by my said will in case of my son dying without issue." It is unnecessary to cite cases as to the operation of codicils inconsistent with the provisions of a will. There is no objection, in principle, to a codicil revoking a prior devise partially, and to the extent only of the new interest which is created. The rule, as laid down in 1 Jarman on Wills, 160, is "not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil." *Duffield v. Duffield*, 2 Bligh. N. S. 260, is a leading authority on the subject. *Thomas v. Evans*, 2 East, 488, confirms the same doctrine. [Lord CAMPBELL, C. J.—There is no doubt that the will operates so far as it is not revoked: the question here is, how far it is revoked.] The words "revocation" and "revoke" are used in the first clause of the codicil, where there is no absolute revoking, but only a substitution of funds. [Lord CAMPBELL, C. J.—You say that the codicil may be construed as if no mention were made of revoking, but the words had been "I hereby alter that part of my last will," &c.] That is so. The lessor of the plaintiff is, therefore, entitled to the moiety of the estates, including those purchased of Mrs. Cipriana, as to which no question of law arises. (No further notice of this part of the case is deemed necessary.)

Butt, contra.—The codicil is a revocation of the whole devise referred to, so far as it relates to John Dolley and his children; and, on the deaths of Ann and Elizabeth Maria without issue, Sarah and her children took in *remainder. Whether, in the clause of the codicil [*219 "whereby I give," &c., "unto my son John Dolley and his heirs," the word "heirs" be read as "children" or not, the effect is the same: there is an entire revocation of the clause in their favour. They are struck out of the will, and Ann and Elizabeth Maria substituted; and on their deaths the freehold goes "as ordered by my said will:" that is, the contingent remainder originally given by the will to the children of Sarah Ward takes effect according to the due course of the limitations; nothing is added to the will or taken from it except the first-mentioned devise. [PARTESON, J.—By the will, the descent of the estates to Sarah and her children depended on a contingency which, according to your view, could no longer have any effect, after the codicil; the death of John without leaving children. You must consider the codicil as doing away with the necessity for that contingency.] The new devise to Ann and Elizabeth Maria and their children is substituted for everything that relates to John and his; with a limitation over (by the operation of the will) to Sarah Ward and her children by way of contingent remainder. It is not a mere postponement of John and his children; for no place is assigned at which they are to come in; and, if they do so, Sarah and her children have no longer a place. [Lord CAMPBELL,

C. J.—The codicil does not make any direct provision for the case of Ann and Elizabeth Maria leaving a child, or having a child which has died.] Sufficient guidance will be found in the limitations of the will following the devise to John and his children. The codicil must be read with these. [Lord CAMBELL, C. J.—They do not provide for the contingency of the two daughters leaving children. PATTESON, J.—Do the *220] children *of Mrs. Ward take the entirety on the deaths of Ann and Elizabeth Maria?] They do. [PATTESON, J.—Under the will, Mrs. Ward, if she had lived, could only have taken a third.] By the codicil she would take the entirety for her life, after the deaths of her sisters. The codicil is inartificial, and not easily explained: but the result of the whole is that John and his issue are put out of the will, and the three sisters and their children written in.

Malins, in reply.—The intention was only to vary the order of limitations. The place of John and his children is after the sisters Ann and Elizabeth Maria, instead of being before the three. [COLERIDGE, J.—That displaces Sarah; yet no such intention is expressed.] She is merely postponed as John is. The words “as ordered by my said will” restore the former arrangement after the decease of the two sisters. [PATTESON, J.—You make these words as it were a revocation of the revocation.] They operate so. There are difficulties as to the succession of Sarah, in any view of the will and codicil. If her interest is contingent on the events specified by the will in the devise to John and his children, the contingency is too remote. If the codicil sets that devise entirely aside, there remains no event on which Sarah could be entitled to take “as ordered by” the testator’s said will. Then the revocation is absolute, and the descendants of John Dolley are entitled as heirs at law.

Cur. adv. vult.

Lord CAMPBELL, C. J., in the same term (January 30th), delivered the judgment of the Court.

*221] *This case depends upon the construction to be put upon the will and codicil of Thomas Dolley. By the will he devises the nine houses in question to his son John for life, and after his death to his children who should attain a certain age: and, in case all such children should die under that age, he then gives the houses in question to trustees, to permit his three daughters, Sarah Ward, Ann Dolley, and Elizabeth Maria Dolley, to receive the rents during their lives in equal shares, and after their decease to their children in fee. The codicil is in these words: “I likewise hereby revoke that part of my last will and testament whereby I give” (the houses in question) “unto my son John Dolley and to his *heirs*” (evidently a mistake for his children): “And my will is that my daughters Ann Dolley and Elizabeth Maria Dolley should enjoy them. I hereby give and bequeath the said freehold ground and houses” “to my said daughters Ann Dolley and Elizabeth Maria Dolley, equally and jointly between them, and to the sur-

vivor of them; and, after their decease, to their child or children equally; and, if they should both die leaving no child or children, *then the said freeholds to go as ordered by my said will.*"

The daughters Ann and Elizabeth Maria both died leaving no child. John Dolley the son in 1850, leaving a daughter, the lessor of the plaintiff Mary Ann Evers, who was born in the lifetime of the testator and is John Dolley's only surviving child: but he had another daughter, Elizabeth Sarah, also born in the lifetime of the testator, who married and had a son; but she and her son both died in the lifetime of John Dolley. The defendants are children of Sarah Ward the other [*222 *daughter of the testator; she is also dead. The lessors of the plaintiff contend that the effect of the codicil is to revoke the devise to John and his children partially only, so as to postpone them to the daughters Ann and Elizabeth Maria and their children, but, on their death without any child, to restore the devises in the will and to let in John Dolley and his children to take prior to Mrs. Ward and her children: also that the lessors of the plaintiff would be entitled to a moiety of the houses in question, the other moiety being in the heir of the son of Elizabeth Sarah, who survived his mother about three months.

The defendants contend that the effect of the codicil is to revoke the devise to John and his children altogether, and to let in the children of Mrs. Ward in the same manner as if John had had no children.

It is plain by the codicil that the testator intended to prefer his daughters Ann and Elizabeth Maria to his son John, and that the revocation of the devise to John and his children was introduced to effectuate that intention: but there is nothing in the codicil showing any intention to prefer Mrs. Ward and her children to John and his children, unless it be found in the revocation itself. Then, the words "to go as ordered by my said will" would not be complied with by holding that Mrs. Ward's children take the houses when there is a child of John living, and who has attained the age required by the will, as Mrs. Evers has attained, because the will orders the estate to go to Mrs. Ward jointly with the two other daughters, and to their children afterwards, *only* in the event of John not having such child; and, even if the devise to John and his children be absolutely revoked by the codicil, still the contingency on which *by the will the estate is ordered to go to Mrs. Ward and [*223 her children is not revoked by the codicil, and has not happened: Mrs. Ward's children, therefore, cannot take "as ordered by" the will; and, if John and his children do not take at all by reason of the revocation, there is no devise of the inheritance after the death of Ann and Elizabeth Maria without a child, and the lessor of the plaintiff Mrs. Evers is entitled to the whole as heir at law of the testator. We are however of opinion that she is entitled to a moiety only.

The general rule is that a revocation by subsequent will or codicil, whether by express words of revocation or by devise inconsistent with

the former devise, shall operate only so far as is necessary to effectuate the intention of the testator: *Duffield v. Duffield*, 3 Bligh. N. S. 260, and other cases, establish this rule. We gather clearly from this codicil that the intention of the testator was to prefer Ann and Elizabeth Maria and their children (if any) to John and his children, and nothing more; and that, failing such objects of his preference, his intention was that the will should operate as if there had been no revocation.

There is no dispute between the parties as to the rules by which the case is to be decided. We therefore need not farther examine the decisions by which these rules have been established; and we have only to apply these rules to the will and codicil in question. Doing so, we are of opinion that the verdict must be entered for the lessors of the plaintiff as to a moiety of the nine houses.

*224] As to the property purchased of Mrs. Cipriana, it is *conceded that it does not pass at all by the will or codicil, and that the lessors of the plaintiff are entitled to it in right of Mrs. Evers as heir. The verdict as to that property must be entered for the entirety.

Judgment for plaintiff.

DOE, on the several demises of THOMAS HENRY EVERS and MARY ANN his Wife, of the said T. H. EVERS, and of Others, v. THOMAS CHALLIS. [Dec. 6, 1850.]

D. (by will made before 1838) devised land to his daughter E. for her life, and, from and immediately after her decease, to such of her children as she might have, if a son or sons, who should live to the age of twenty-three years, if a daughter or daughters, who should live to the age of twenty-one years, and their heirs, as tenants in common: in case of the death of a son under twenty-three or a daughter under twenty-one, the share of such child to go to the surviving children attaining the ages named, and their heirs, as tenants in common; or, if only one should attain the age, to such child in fee: in case all the children of E. should die under the ages named, or if she should have none, then to D.'s daughter A. for life, and, upon her decease, to her children, if a son or sons, living to attain the age of twenty-three years, if a daughter or daughters, living to the age of twenty-one years, and their heirs, as tenants in common; and, if only one child, to such child in fee: "And, further, in case of the death of" A. "without leaving a child, if a son, who shall live to attain the age of twenty-three years, or, if a daughter, who shall live to attain the age of twenty-one years" (not adding an express provision for the event of A. having no child), "I give the part and parts such children or child would be entitled to as aforesaid to J." After D.'s death, E. died without having had a child: and afterwards A. died without having had a child.

Held, by the Court of Q. B., that the limitation over to J., might take effect as a contingent remainder upon A.'s death without leaving a child attaining the age named.

Held, by the Court of Exchequer Chamber, reversing this judgment, that the limitation over was not to be considered as expectant upon either event, of A. dying childless, or her dying without leaving a child that should attain the age, but upon the single event (however it might happen) of her dying without leaving a child that should attain the age, and was therefore an executory devise void for remoteness.

EJECTMENT for messuages and lands in the parish of St. Giles without Cripplegate in the city of London.

On the trial, before Coleridge, J., at the London sittings after Michael-

mas Term, 1849, a special verdict was found; which, so far as is material to the present decision, was as follows.

*Thomas Dolley, being seised in fee of certain freehold premises, duly made and published his will and codicil, respectively [*225 bearing date 12th June, 1819, and 20th March, 1820.

The verdict set out the said will and codicil, which will be found in Doe dem. Evers v. Ward, ante, p. 198, et seq. (The material part, so far as this argument is concerned, is the devise in trust for Elizabeth Maria, for life, and then over; commencing at p. 207, "I likewise give," and ending at p. 210, "estates and premises." The property which was the subject of this part of the devise comprehended that for which the present action was brought.)

The verdict then stated the following facts.

The said Thomas Dolley died seised of the premises in the will and in the declaration mentioned, on 26th March, 1821, without altering or revoking the said will and codicil, or either of them. At the time of the execution of his will and codicil, and at the time of his death, the said Thomas Dolley had one son, the said John Dolley (mentioned in the will), and a daughter, the said Ann Dolley (mentioned in the will), and another daughter, the said Elizabeth Maria (mentioned in the will), and another daughter, the said Sarah Ward (mentioned in the will), and a daughter named Margaret Cresswell, who was married to White, and died in 1834.

There had been another son besides the said John Dolley; but such other son, whose name was Thomas, was dead before the date of the will. He died unmarried.

On 25th June, 1806, John Dolley intermarried with Mary Ann Carr.

*On 18th August, 1838, Elizabeth Maria Dolley, having married Joseph Doxsey, died, never having had a child. [*226

On 31st March, 1847, Ann Dolley, having intermarried with Isaac Akerman, died, never having had a child.

On 27th February, 1830, Sarah Ward died, leaving seven children, namely, three sons and four daughters, all born before the death of the testator (the names were stated).

On 31st January, 1809, Mary Ann Dolley, one of the lessors of the plaintiff, the child of John Dolley, was born, and is still living. John Dolley had two daughters living at the time of the death of the testator, and who were also alive at the death of Ann Dolley, namely, Mary Ann Dolley, one of the lessors of the plaintiff, born as aforesaid, and Elizabeth Sarah, born 25th December, 1820, afterwards married to George Huddleston. John Dolley had also a daughter named Clarissa: she was born after the death of the testator, and died an infant, that is to say, a year after her birth.

On the 21st December, 1834, the said Mary Ann Dolley, one of the

lessors of the plaintiff, married Thomas Henry Evers, one of the lessors of the plaintiff.

John Dolley, mentioned in the will, was and is the eldest son of the said testator, and the heir at law of the said testator. He is still living.

The verdict then set out a deed under which the defendant claimed through John Dolley, the heir at law.

The case was argued in Michaelmas Term, 1850,(a) by *Malins* for the plaintiff, and *Peacock* for the defendant.

It is not thought necessary to report the argument in this Court. It will be sufficient to refer to the *judgments of this Court and the *227] Exchequer Chamber, and the argument in the latter Court (post, p. 232). *Cur. adv. vult.*

LORD CAMPBELL, C. J., in the vacation following (December 6th, 1850), delivered the judgment of the Court.

On this special verdict we are of opinion that the lessors of the plaintiff are entitled to our judgment.

First, we have to examine their claim to one-twelfth of the freehold property contained in the devise to Elizabeth Maria Dolley. This depends upon the limitation over, in case all the children of Elizabeth Maria should die under the ages specified, or if she had none. If valid, in the events which have happened this would vest one-third in Ann Dolley, and, on her death, the twelfth claimed in Mrs. Evers (late Mary Ann Dolley), one of the lessors of the plaintiff.

On the part of the defendant, who claims under the eldest son and heir at law of the testator, it is first contended that the limitation is void because it could only take effect by way of executory devise, and that the executory devise would be bad as being too remote. If Elizabeth Maria had died leaving children, this objection would have been fatal; for upon her death the property would have vested in them as tenants in common in fee, according to the decision of this Court upon this very will in *Doe dem. Dolley v. Ward*, 9 A. & E. 582 (E. C. L. R. vol. 36). The subsequent limitation, therefore, could only have taken effect by way of executory devise: and, as the gift over was upon the *228] death of the children of Elizabeth Maria, if a son *or sons, under the age of twenty-three, or, if a daughter or daughters, under the age of twenty-one, this would have been contrary to the rules against perpetuities, and void. But, in the event which happened, the contingent remainder to the children of Elizabeth Maria never took effect, she never having had a child. And the question is whether, in this event, the subsequent limitation may not take effect as a contingent remainder, supported by the life estate of Elizabeth Maria, and vesting immediately on the determination of that life estate.

Although, where a fee is given by a vested limitation, a remainder

(a) November 19th. Before Lord Campbell, C. J., Coleridge, Wightman, and Erie, Js.

upon it must be an executory devise, and, if it be too remote, this and all subsequent remainders are void, if a fee be limited in contingency, and the estate is given over upon a contingency divesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder. "It may happen that an estate may be devised over in either of two events; and that in one event the devise may operate as a contingent remainder, in the other as an executory devise." This is the language of Bayley, J., in *Doe dem. Herbert v. Selby*, 2 B. & C. 926, 930 (E. C. L.R. vol. 9), a case which seems to us to govern the present. There the testator devised freehold property to his son George for life, and, "after his decease," "unto all and every the child and children of my said son George," "and their heirs for ever, to hold as tenants in common." "But if my said son George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue; then I give and devise the same estates unto my said son Thomas, my daughter Ann Southern, and *my son-in-law, William Duke, and their heirs [229 for ever, to hold as tenants in common." Now, if George had died leaving children, the fee would immediately have vested in them, and the limitation over to Thomas, Ann, and William Duke could only have taken effect as an executory devise. But the Court of King's Bench clearly held that, as George died without having had a child, the limitation over was to be construed a contingent remainder. The question arose from George in his lifetime having suffered a recovery. In the event which happened, if the limitation in favour of Thomas, Ann, and William Duke was to be taken as a contingent remainder, it was barred by the recovery; but if as an executory devise, it was not. Bayley, J., presiding here in the absence of Lord Chief Justice Abbott, said: "If George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder." Holroyd, J., and Littledale, J., fully concurred. And the consequence followed that the remainder over to Thomas, Ann, and William Duke, continuing to be a contingent remainder, was barred by the recovery, which, destroying the particular estate, left it without support. It has been remarked that in *Doe dem. Herbert v. Selby*, instead of saying the limitation was a contingent remainder in one event and an executory devise in the other, it would be more accurate to say there were two alternative remainders in fee, one of which was contingent, and was subject to an *executory limitation in favour [230 of the same person who would have been the object of the alternate remainder. But, whatever may be the technical language in which the limitations should be described, it was decided that, if the first contingent remainder never vested, the second limitation would take effect

as a contingent remainder. This decision, which is founded on prior authorities, and has never been questioned, seems to us quite sufficient to show that, in construing the will of Thomas Dolley, the limitation of the property left to Elizabeth Maria, after her children, is to be considered as taking effect as a contingent remainder.

Another objection made was upon the language of the remainder over, "unto the child or children of my said son and two daughters," which is only, in express words, "in case of the death of my said son or either of my said two daughters without leaving a child, if a son, that shall live to attain the age of twenty-three years, or, if a daughter, who shall live to attain the age of twenty-one years," without saying, with respect to his daughter Ann Dolley, "if she has none:" the argument being, that, as Ann never had a child, the contingency has not arisen on which her share was devised to the children of John Dolley. But we consider it quite clear, from the testator's language, that he intended this remainder to take effect upon his daughter Ann having no children, in like manner as upon her having children and dying without leaving children who should live to the required age. There is a long string of cases to support the doctrine that, if there be a gift over on a class dying within a particular age, it takes effect if that class never comes into existence. I consider it sufficient to mention the first *231] of them, which has been often acted upon, **Jones v. Westcomb*, 1 Eq. Ca. Ab. 245, where a testator bequeathed a term of years to his wife for life, and, after her death, to the child she was then enceinte with, and, if such child should die before the age of twenty-one, then one-third to his wife, and the other two-thirds to other persons. The wife was not enceinte. But Lord Harcourt, and afterwards the Court of King's Bench,^(a) held that the bequests over took effect.

The lessors of the plaintiff likewise claiming one-twelfth of the freehold property devised by the testator to his daughter Ann Dolley, it was admitted that this claim was not liable to any objection which was not urged against the former. And, therefore, our judgment will be in favour of the lessors of the plaintiff for both the twelfths which are claimed.

Judgment for plaintiff.

(a) *Gulliver v. Wickett*, 1 Wils. 165.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

CHALLIS *v.* DOE, on the several demises of THOMAS HENRY EVERS and MARY ANN his Wife, of the said T. H. EVERS, and of Others.

For syllabus, see page 224, *antè*.

ERROR was brought on the above judgment in the Exchequer Chamber. The case was argued in last Michaelmas Vacation.(a)

**Roll*, for the plaintiff in error (defendant below).—The case for the plaintiff below, as to Ann's share of the property devised [*232 to Elizabeth Maria, is that, upon the death of Elizabeth Maria without issue, her brother John and her sisters Sarah and Ann took each one-third of the whole for life: and that, upon Ann's death without issue, the two children of John took between them one-half of Ann's third, that is, one-twelfth each. And this claim rests upon the assumption that the limitation over, in case of the death of the son or either of the daughters, one of whom is Ann, without leaving a son who should attain the age of twenty-three years, or a daughter who should attain the age of twenty-one, can take effect within the legal restrictions as to remoteness.

The defendant below contends that, as Elizabeth had no child living at the death of the deviser, and as the limitation might not take effect for twenty-three years if she had a son, it reaches beyond any life in being and twenty-one years after the expiration of such life; and therefore, if the limitation can take effect only as an executory devise, it is bad. But, for the plaintiff below, it is answered that the limitation may take effect as a contingent remainder, and that therefore the objection as to remoteness does not arise. In support of this argument, reliance is placed on *Cole v. Sewell*, 2 H. L. Ca. 186.(b)

First: the limitation in question is not a contingent remainder, but an executory devise. Another clause in this will was the subject of the decision in *Doe dem. Dolley v. Ward*, 9 A. & E. 582 (E. C. L. R. vol. 36).(c) There land was devised, after the decease of Sarah Ward, "unto such of her children as *she now has or may have, if a son or sons, at his [*233 or their age or ages of twenty-three years, and, if a daughter or daughters, at her or their age or ages of twenty-one years, their respective heirs, executors, administrators, and assigns, according to the nature thereof, as tenants in common: and, in case of the death of any child or

(a) November 27, 1851. Before Maule, Cresswell, Williams, and Talfourd, Js., and Platt and Martin, Bs. Cresswell, J., and Martin, B., left the Court at the close of the argument for the defendant in error.

(b) Affirming the decree of the Lord Chancellor of Ireland, in *Cole v. Sewell*, 4 Drury & Warren, 1.

(c) See pp. 201—204, *antè*.

children of her my said daughter, if a son or sons, under the age of twenty-three years, and a daughter or daughters, under the age of twenty-one years, the share or shares of each such child, son or daughter, so dying, to go to the survivors and survivor of such child and children, being a son or sons, on his or their attaining the said age of twenty-three years, and, if a daughter or daughters, on her or their attaining the age of twenty-one years, and their heirs, executors, administrators, and assigns, in equal shares, as tenants in common." The question arose, whether the first limitation gave estates which could vest only on the son or daughter attaining the ages named, or whether the estate vested immediately on the birth of the child, but the possession was postponed. On the former construction, the limitation would have been void, as an executory devise which might not take effect till the expiration of twenty-three years from the death of the tenant for life: on the latter, that objection would not arise. The latter view prevailed; and it was held that the estate in fee vested immediately on the birth of the child, the remainder being contingent till then. Now that decision shows that, in the present case, the limitation to the children of Elizabeth Maria was a contingent remainder in fee, which would become a vested fee on the birth of a child. The limitation over, therefore, acts by way of cutting down a fee, and is an executory devise. It is *234] not the *case of a contingent remainder with a double aspect. One event only is named, the death of the tenant for life without leaving a son or daughter who should attain the age specified. This distinguishes the case from one which is relied upon on behalf of the plaintiff below, *Doe dem. Herbert v. Selby*, 2 B. & C. 926 (E. C. L. R. vol. 9). There the devise was to G. for life, remainder to his children in fee as tenants in common: but, if G. should die without issue, "or" leaving issue and such children should die before attaining the age of twenty-one or without lawful issue, then over. G. died leaving no issue. No question arose as to remoteness: but G. had suffered a recovery, which would defeat contingent remainders but not executory devises: and it was held that the limitation over created a contingent remainder with a double aspect, and was defeated by the recovery. Had the event only of the children dying before attaining the ages been mentioned, there would have simply been a limitation of a remainder in fee and an executory devise superseding the fee upon a particular event. *Ludington v. Kime*, 1 Ld. Raym. 208, S. C. 3 Lev. 481, and *Crump dem. Woolley v. Norwood*, 7 Taun. 362 (E. C. L. R. vol. 2), are to be explained similarly. It is true that a person who dies leaving no issue at all does die without leaving either son or daughter who attains the specified age. But that mode of the realization of the event is not pointed at in the limitation. *Gulliver v. Wickett*, 1 Wils. 105, was referred to in the argument below. In that case, there was a devise to the devisor's wife for life, and, after her death, to a child of which she was

supposed to be enceinte in fee: and, if the child should die before the age of twenty-one without issue, then over. The wife was not enceinte in *fact. There was no question as to remoteness: but it was held that the limitation over took effect; for that the birth of [*235 the child was not a condition precedent, but the limitation to it created a remainder. The reporter, in a note, expresses a doubt, whether the limitation over was considered a contingent remainder or an executory devise: Fearn, Cont. Rem. 396, shows that it was treated as an executory devise, and that it would have been void ab initio as a contingent remainder. If, therefore, the age named had been twenty-three instead of twenty-one, the limitation would have been bad for remoteness. But then it would have been precisely the case now before the Court.

Supposing this to be a contingent remainder, it is argued that *Cole v. Sewell*, 2 H. L. Ca. 186, shows that the objection as to remoteness cannot arise. It is true that Lord Brougham does there say that, inasmuch as a contingent remainder must take effect, if at all, on the termination of the particular estate, the protection afforded by the rule against remoteness is unnecessary. Some surprise was created in the profession by that language; for it was conceived that to limit land to the unborn sons of unborn sons violated the law against remoteness, whether this was done by way of executory devise or by way of contingent remainder. But this answer to the objection for remoteness can apply only where the preceding estate is an estate tail, as it was in *Cole v. Sewell*, not where, as here, it is a fee. This is pointed out by Mr. Jarman (*On Wills*, vol. 2, p. 782) in his remarks on the language of Lord Chancellor Sugden, in the Irish Court of Chancery: (a) and Sir Edward Sugden, *remarking (in his *Treatise of the Law of Pro-* [*236 perty, as Administered by the House of Lords, p. 120) upon Mr. Jarman's observations, appears to assent to this restriction of the doctrine.

The Court below seems to have assumed that the character of the limitation may be determined by the event. But the limitation cannot be supported unless it was valid upon every mode of the occurrence of the event which was possible at the time of the will first coming into operation, that is, at the death of the deviser. In this respect, the rule is the same as to realty and personalty. Before determining whether the limitation takes effect as a contingent remainder or an executory devise, it must appear that it is a valid limitation, which must be determined before the events have taken place. And this is so, whether the vice of the limitation be in the description of the event or in that of the class which is to take, as where it is expectant upon the failure of a class which may not fail within the legal time, or where it is to a class which may possibly not come into existence within such time. *Jee v. Audley*, 1 Cox, Ca. Ch. 324, is an instance of the application of this

(a) *Cole v. Sewell*, 4 Dr. & War. 28.

rule, as to the failure of a class, to personalty: and there Sir L. Kenyon, M. R., said that the question was, not whether the limitation was good in the events which had happened, but whether it was good in its creation. *Leake v. Robinson*, 2 Meriv. 363, was a similar case, including both realty and personalty; and there Sir W. Grant, M. R., upheld the doctrine in *Jee v. Audley*. The rule as to classes and as to events must be the same.

*237] In *Leake v. Robinson* the Master of the Rolls *refused to split a bequest to a class into bequests to different subdivisions of the same class: (a) and that case is so far an authority against the attempt here made to turn the executory devise into an alternative contingent remainder by subdividing the one event named into two modes in which it might occur. In *Bull v. Pritchard*, 1 Russ. 213, two events were actually named: there being no children of a person then living, or there being children who should all die under twenty-three: and it was held, by Lord Gifford, M. R., that a limitation expectant upon the happening of either of these events was too remote. The property there in question was leasehold. Afterwards, the same devise was brought under the consideration of Wigram, V. C., with respect to realty, in *Bull v. Pritchard*, 5 Hare, 567; and he also held the limitation over bad for remoteness. It is true that no attempt was there made to construe the limitation as an alternative contingent remainder. [WILLIAMS, J.—I believe Lord Gifford's decision has been questioned. (b)] In *Newman v. Newman*, 10 Sim. 51, the devise was to all the children of four existing persons who should attain the age of twenty-four. There were children of the four at the devisor's death; but none were born after: the devise was held to be void for remoteness. In *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358, an advowson was devised to the first or other son of P., a living person, that should be bred a clergy-*238] man and be in holy orders; and, if P. should have *no such son, then over: P. died without having any son at all: but the limitation over was held void for remoteness. Yet there it might have been said, as well as it can be said here, that the event of P. dying without leaving any son at all was one event upon which a good limitation might be expectant.

In the Court below the distinction seems to have been lost sight of between the questions whether a limitation is valid, and how a limitation, if valid, is to be applied. The former is the question here. But, in cases raising the latter question, it may be that the complex event will be considered as involving several alternative events; so that, for instance, if land be given to A.'s son on his attaining twenty-one, and, if no son of A. attain twenty-one, then over, that the limitation over

(a) 2 Meriv. 390.

(b) See *Bland v. Williams*, 3 Myl. & K. 411; *Doe dem. Dolley v. Ward*, 9 A. & E. 605 (H. C. L. R. vol. 36).

may take effect if A. has no son at all. The limitation is there good from the first; but it will be applicable according to the event. But the event cannot determine whether the limitation be valid: that must be ascertained, one way or the other, the moment the will comes into operation. Thus, under the old law, a limitation expectant upon the death of A. without issue, inasmuch as this was construed to mean the failure of A.'s issue at any time, was too remote: and it was not made good by A. dying without issue. And it was with the view of partially remedying this that, by stat. 7 W. 4 & 1 Vict. c. 26, s. 29, it was enacted that such a limitation, unless a contrary intention should appear (as there described), should be construed to mean a failure of issue in the lifetime or at the death of the party named.

Further, those cases are inapplicable where two *contingencies are expressly named, upon one of which only a valid limitation [*289 can be expectant, and the construction is as if such one only had been named. *Longhead dem. Hopkins v. Phelps*, 2 W. Bl. 704,(a) is such a case. There, if the event occur upon which the limitation may be well limited, the limitation takes effect, because it was so far valid from the very first.

Malins, *contra*.—It is true that the limitation cannot be construed by the event: the event shows only who is to take.

It is an established rule that, wherever a limitation, which would be bad as an executory devise, can be supported as a contingent remainder, this construction shall be adopted. That rule was recognised in *Cole v. Sewell*, 2 H. L. Ca. 186. If an estate were limited for life to an unborn son, and afterwards to his son, the last limitation would be bad, because it might not take effect within twenty-one years after lives in being. But, if the remoter limitation were immediately expectant upon an estate tail, it would be construed as a contingent remainder, and be valid, since the tenant in tail might dispose of the whole estate: and so it would be if the limitation were expectant upon a series of lives all in existence; for then the limitation might be defeated by the destruction of the life estate. The attempt to restrict this rule failed in *Cole v. Sewell*: and the language of Sir Edward Sugden in that case, in the Court below is very strong.(b) The limitation over, by which the lessors of the plaintiff here claim, is substantially the *same as that in *Doe dem. Dolley v. Ward*, 9 A. & E. 582 (E. C. L. R. vol. 36). [*240 There, in the event, the remainder to the children of Sarah was vested: here the remainder to Ann's children, having been contingent up to her death, fails: if she had left children, they would have taken a vested interest. The limitation depends upon a contingency with a double aspect, as in *Luddington v. Kime*, 1 Ld. Raym. 203, S. C. 3 Lev. 481; here, as there, one of the contingencies must be determined on the

(a) See judgment in *Crump dem. Woolley v. Norwood*, 7 Taun. 372 (E. C. L. R. vol. 2). *Goring v. Howard*, 16 Sim. 395.

(b) 4 Dr. & War. 28.

expiration of a life in being. The point was in fact decided in *Doe dem. Herbert v. Selby*, 2 B. & C. 926 (E. C. L. R. vol. 9). It is true that nothing there turned on the question of remoteness; but it was decided that a recovery by the tenant for life barred the limitation over: which shows that here Ann, by suffering a recovery, might have defeated the estates limited over. *Carwardine v. Carwardine*, Fearn, Cont. Rem. 388, S. C. 1 Eden's Ch. Ca. 27, is an instance of construing a limitation as a contingent remainder rather than a springing use. In *Gulliver v. Wickett*, 1 Wils. 105, the devise to the supposed child created a vested estate, because a child of the devisor would be living either at the devisor's death or within the period of gestation: the limitation over was therefore an executory devise: that principle is inapplicable here. In *Festing v. Allen*, 12 M. & W. 279,† land was devised to M., "and from and after her decease, to the use of all and every the child or children of her" "who shall attain the age of twenty-one years:" M. died, leaving children, all infants: it was held that the devise to her children was a contingent remainder, which failed by reason of the failure of the particular estate *before such remainder could vest. *241] The Court there acted in conformity with *Russel v. Buchanan*, 2 Cr. & M. 561.† S. C. 4 Tyrwh. 384. In *Bull v. Pritchard*, 5 Hare, 567, it seems to have escaped notice that the limitation might be supported as a contingent remainder: the point was not made. In *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358, the limitation was necessarily construed as an executory devise, there being no particular estate which could have supported a contingent remainder.

But here it is suggested that the complex event of Ann leaving no children who should attain the specified ages cannot be considered as comprehending the two events; dying without leaving children, and leaving children who should all die within the specified ages. The events, however, are distinctly designated in the preceding limitation to Elizabeth Maria and her children: it is very improbable that the testator meant to make different dispositions in the two cases. In *Murray v. Jones*, 3 Ves. & B. 313, a gift was limited upon the event of the testatrix having but one child living at the time of her death: and Sir W. Grant, M. R., held that this comprehended the event of the testatrix dying childless. A similar doctrine may be collected from *Fearn, Cont. R.* 510, *Jones v. Westcomb*, 1 Eq. Ca. Abr. 245, *Mackinnon v. Sewell*, (a) *Wilson v. Mount*, 2 Beav. 397, *Meadows v. Parry*, 1 Ves. & B. 124. [MAYLE, J.—Cases are not wanting in which the exact *242] form of words has *determined the interpretation of the devise. WILLIAMS, J., referred to *Doe dem. Blakiston v. Haslewood*, 10 Com. B. 544 (E. C. L. R. vol. 70).]

It is true that, as was decided in *Leake v. Robinson*, 2 Meriv. 363, 390, if there be a devise to a class, comprehending some who cannot

(a) 5 Sim. 78, before Shadwell, V. C.; 2 Myl. & K. 202, before Lord Brougham, C.

take, the gift cannot be divided into two classes, one capable and the other incapable. But the limitation here contemplates two distinct events, that there should be no children, or that there should be children taking vested interests afterwards defeated.

Cases respecting bequests of personalty cannot safely be applied to the determination of this question. The rule as to remoteness is not there qualified by the possibility of defeating a limitation, however remote, which may take effect as a contingent remainder. *Jee v. Audley*, 1 Cox, Ca. Ch. 324, and *Newman v. Newman*, 10 Sim. 51, were cases of personalty.

Roll, in reply.—It is impossible to select in this limitation any words upon striking out which there will be left a limitation upon the event of Ann dying without children. The cases which have been cited, in which events not named have been introduced in order fully to express a presumed intention of a testator, are dangerous precedents: a safer principle was acted upon in *Doe dem. Blakiston v. Haslewood*, where *White v. Barber*, 5 Burr. 2708, was overruled. [MAULE, J., referred to *Monypenny v. Dering*, 2 De G. Macn. & G. 145, 7 Hare, 568, 16 M. & W. 418,† 9 Com. B. 700 (E. C. L. R. vol. 67).] It, will, however, be found that these cases were instances of applying of a limitation *valid in itself, not of modifying one which was void for remoteness. [PLATT, B.—Where was the remainder at the time [*243 of the death of Ann?] Up to the time of her death, there was a contingent remainder to her possible children; on her death without children this failed; and, there being no limitation expectant on the event of her so dying, the limitation to her brother's children was expectant upon limitations which are admitted to be bad for remoteness.

The rule as to inferring contingent remainders has been stated rather too strongly on the other side. Instead of saying that, where a limitation can be construed as a contingent remainder, it must be so construed, it would seem more correct to say that, if either construction be equally obvious, and there be a good particular estate, the limitation will be construed as a contingent remainder. But, when in a given event which may happen it must be an executory devise, the rule does not apply.

Cur. adv. vult.

ALDERSON, B., in this vacation (February 2d), delivered the judgment of the Court.

This is a writ of error upon the judgment of the Court of Queen's Bench upon a special verdict.

This was an action of ejectment, brought to recover one-twelfth part of certain property devised by the will of one Thomas Dolley to his daughter Elizabeth. The lessors of the plaintiff were Mary Ann Evers and her husband, she being one of two children of John Dolley, the son of the testator.

The testator had four children, John, Sarah, Ann, and Elizabeth:

*244] and, by his will, dated 12th June, 1819, he *gave the property (the one-twelfth of which is now in question) to trustees during the life of his daughter Elizabeth, in trust for her separate use, and, after her decease, he gave the same to such children as she might have, if a son or sons, who should live to the age of twenty-three years, and, if a daughter or daughters, who should live to the age of twenty-one years, their heirs and assigns, as tenants in common. He then provided for the disposition of the property in the event of one or more of the children of Elizabeth dying, leaving others or another surviving. He then proceeded thus: "In case all the children of my said daughter Elizabeth Maria shall die, if a son or sons, under the age of twenty-three years, or, if a daughter, under the age of twenty-one years, or if *she has none*," I give the said property, &c., unto the said trustees, during the respective lives of my son John and my daughters Sarah Ward and Ann Dolley, upon trust for the use of John, and the separate uses of Sarah and Ann, during their lives, in equal shares; "and, upon the decease of my said son and two last-named daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to attain the age of twenty-three years, and, if a daughter or daughters, living to the age of twenty-one years, his, her, and their heirs, executors, administrators, and assigns;" if more than one, as tenants in common. "And" (the part of the devise upon which the question depends), "in case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to attain the age of twenty-three years, or, if a daughter, who shall live to attain the age of twenty-one years, I give the part and parts such children or child would be entitled to as aforesaid unto the child or *245] *children of my said son and two daughters having issue, if a son or sons, living to the age of twenty-three years, and, if a daughter or daughters, living to attain the age of twenty-one years: if two of my said last-named children have such children or child, to them, his, or her heirs, executors, administrators, and assigns, as taking in equal shares from his or her father or mother, his, her, and their heirs, executors, administrators, and assigns."

Elizabeth died in August, 1838, having been married, but never having had a child. Upon her death, her brother and two sisters took each one-third of the property devised to her as above. In March, 1847, Ann died, having been married, but also never having had a child. And thereupon Mrs. Evers, being one of two children of John, and being twenty-one years of age, claimed one-twelfth of the property devised to Elizabeth, insisting that, upon the event which had happened, the two children of John became entitled to half of the one-third of the property devised to Elizabeth which had come to Ann upon her death, and that she, as one of them, was entitled to the half of this half, or one-twelfth of the whole.

A special verdict was found, which stated the above facts: and judgment was given by the Court of Queen's Bench for the lessors of the plaintiff. And upon this judgment the present writ of error is brought.

This will came under the consideration of the Court of Queen's Bench in the case of Doe dem. Dolley v. Ward, 9 A. & E. 582 (E. C. L. R. vol. 36): and both parties acquiesce, and we think, most correctly, in the propriety of that decision.

We are to take it, therefore, as clearly established that by this will the testator gave an estate for life to his *daughter Elizabeth, [*246 with a contingent remainder in fee to her unborn children, which, on the birth of a child, became a vested remainder in fee; and that, upon such child or children being born, but failing, if male, to attain twenty-three, and, if female, twenty-one, then he gave Elizabeth's share over by an executory devise to his other three children equally. Now it is clear that this executory devise over would be void as too remote. But in this part of his will the testator also provided, by a distinct and separate clause, that, if Elizabeth should have no children, the property devised to her should go over in like manner to his three remaining children. Now in that event (which happened) the contingent remainder to Elizabeth's children never vested; and so the devise over took effect, not as an executory devise, but as a good contingent remainder to the three other children of the testator, one of whom was the testator's daughter Ann.

In the event therefore which has happened, the devise was one to Elizabeth for life, contingent remainder to her unborn issue (which failed), contingent remainder, as to one-third, to Ann for life, with a contingent remainder in fee to Ann's unborn issue, to become vested on the birth of a child, and with the devise over (on which the present question turns) in favour of the children of her surviving brother John and sister Sarah. Now Ann died, never having had a child; and, consequently, the contingent remainder in fee given to her children failed.

We must look therefore at the terms of the devise over.

They are as follows: "In case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to attain the age of *twenty-three years, or, if a daughter, [*247 who shall attain the age of twenty-one years, I give the part and parts *such children or child would be entitled to as aforesaid* unto the child or children of my said son and two daughters *having issue*, if a son or sons, living to the age of twenty-three years, and, if a daughter or daughters, living to attain the age of twenty-one years; if two of my said last-named children have such children or child," &c.

Now here there are not the two events which were separately and distinctly mentioned in the former devise over. The event, if she shall have no children, is not mentioned in terms at all.

The question between the parties is, whether this devise over be void or not. It may be well admitted that the testator intended to include in these words two events: first, the event of Ann having no child at all; for, certainly, if she never had a child, she must die without leaving a son who could attain twenty-three or a daughter who could attain twenty-one; but, secondly, he also intended to include in these same words the compound event of her having a child and that child dying under the prescribed age. This second event is, according to all the cases, too remote an event to take effect according to law. The first, if it stood alone, is legal. The thing to be settled is the principle upon which the Court is to act.

In the first place, it seems established that the time to construe the will is at the testator's death. The devise must be legal at that time, to oust the heir at law. Now, at the death of the testator and in the lifetime of Ann, how would this devise have been construed? For it is not sufficient that, on the happening of certain events, the devise may *248] take effect, and, if limited to these events *originally, would have been valid: but it ought to be shown that the devise of the testator must be valid and legal in all the events contemplated by him.

This, we think, is the principle contained in the passage of Sir W. Grant's judgment in *Leake v. Robinson*, 2 Meriv. 390, in which he says: "Executory devise is itself an infringement on the rules of the common law, and is allowed only on condition of its not exceeding certain established limits." In a devise to a class, therefore, the Courts do not split the devise into its parts and give effect to the legal part of it. For this, says Sir W. Grant, is to make a will for the testator. He says: "I give my property to the whole of this class." It may be that the persons to whom he is not permitted by law to give it are the very persons in favour of whom he includes the whole class in his bounty: and therefore, in splitting the devise into its parts, you may perhaps violate his will, even as to those to whom you give it. If he separates the devises himself, it is not so. Here the meaning, and the true meaning, of this clause is, *In every event* which can happen in which Ann dies leaving no child who if male attains twenty-three or if female twenty-one, I give the estate over. That is what he says, and what he means. He includes all these events in one class. Some are legal, some illegal. How is the Court to separate these events, which the testator has expressly joined together, without making a will for him?

The principle, therefore, seems to be against splitting such a devise when we are considering the question whether it is a legal one. Now this question, it is conceded, must be determined as on reading the will *249] at the *instant of the testator's death. Do the cases cited affect this principle?

On looking at them, we find that in all of them the devise in any event was legal, and that it was competent to the testator to make it. In *Jones v. Westcomb*, 1 Eq. Ca. Abr. 245, the case on which the Court of Queen's Bench proceeded, this was so. That was a bequest to the wife for life, and, after her death, to the child with which she was supposed enceinte, and, if such child should die before twenty-one, then, as to one-third, to his wife, and two-thirds to other persons: and it was held, the wife not being enceinte, that the bequest over took effect. But, if the testator had distinctly expressed all that the Court held to be included in the words he used, the whole would have been still legal. This is not an authority, therefore, for splitting a devise and giving effect to the legal, rejecting altogether the illegal part of it. *Gulliver v. Wickett*, 1 Wils. 105, which is in truth the same case, only applying the will to real estate, is to the same effect. And the observations of the Court in this latter case, as to the validity of the executory devise over, if it took effect as an executory devise, were material if this necessity for the devise being legal in all the contingencies contemplated by the testator be the true principle on which the Court acts, and may reconcile the observations of Mr. Fearne (Cont. R. p. 396) with those of Bayley, J., in *Doe dem. Harris v. Howell*, 10 B. & C. 191, 200 (E. C. L. R. vol. 21). *Meadows v. Parry*, 1 Ves. & B. 124, is to the same effect. These cases are fully explained and put on a very clear principle by Sir W. Grant in *Murray v. Jones*, 3 Ves. & B. 819. They show, no doubt, that the existence ~~and failure of the children to whom~~ the provisions limited is made is not in all cases, and was not in [*250 these cases, a condition precedent to the devise over. But they show no more, and do not at all apply to the question now before the Court, whether, if one of the contingencies be illegal, the single devise which includes that contingency with others becomes void. If Lady Bath had separately stated in her will the two contingencies, in either of which Mrs. Markham was to take, each would have been legal; and the Court held that her including them in one expression made no difference. It is like expressing the individuals of a class, all of whom can legally take, and including all those individuals in a class which is good. But the reverse is true if some of the individuals cannot legally take. There, if expressly named, the will is carried partly into effect. If classed, it is void altogether.

Suppose that this had been the limitation in a deed: To Ann for life, remainder to her children in fee, and if she have none who, if a male, attains twenty-three, or, if a female, attains twenty-one, then over: it is, we apprehend, clear enough that such a limitation over would be void altogether at the common law. It may however, says Mr. Fearne (Cont. R. p. 373), be good in a will, or by way of use, upon a contingency to happen within a reasonable period. Now, if so, must the contingency

here so happen? We think not: for it may go beyond the time allowed by law, if the natural and full effect be given to the words of the testator.

For these reasons, we think that the judgment of the Queen's Bench must be reversed.

Judgment reversed.

END OF HILARY VACATION.

CASES
ARGUED AND DETERMINED
—
THE QUEEN'S BENCH,
—
Easter Term,

XV. VICTORIA. 1852.

THE Judges who usually sat in Banc in this Term were:—

LORD CAMPBELL, C. J.
WIGHTMAN, J.

ERLE, J.
CROMPTON, J.

The following rule was read in Court, April 27th.

In the Queen's Bench.

Easter Term, 15 Victoria, 1852.

REGULA GENERALIS. It is ordered that, whenever a defendant shall be required by law and the practice of this Court to give recognisance to appear and answer to any indictment found in this Court, or removed or to be removed into the same, it shall be added to the condition of every such recognisance That the defendant shall personally appear from day to day on the trial of such indictment, and not depart until he shall be discharged by the Court before whom such trial shall be had: Unless the Court, or a Judge, shall think fit to dispense with such additional condition.

By the Court.

*252]

*LANE v. HILL. April 15.

A plaintiff cannot recover on an account stated without showing some item, to a specific amount, agreed upon as due; though a single item would be sufficient.

Plaintiff, to prove an account stated, gave in evidence a letter in which defendant wrote to plaintiff: "Oblige me by holding my check till Monday, and in the interim I will send you the amount in cash." The check, being post-dated, could not be read as evidence; and there was no further evidence of the amount admitted by defendant to be due.

Held, by Lord Campbell, C. J., Wightman and Crompton, Ja., That the plaintiff could not recover even nominal damages.

By Erle, J.—That nominal damages might be given, the letter showing that a definite sum had been arrived at in account, though the amount could not be proved.

ASSUMPSIT. 1st count on a banker's check for 26l. 5s., made by defendant, and of which plaintiff was bearer. 2d count for 30l. for money found to be due from defendant to plaintiff on an account stated between them.

Pleas. 1. That defendant did not make the check in manner and form, &c. 2. Non assumpsit. Issues thereon.

On the trial, before Erle, J., at the sittings in Middlesex after last Michaelmas term, the plaintiff failed in his proof of the check, it being post-dated: but, to show an account stated, he put in the following letter, received by him from the defendant.

"Dear Sir. I must request you to oblige by holding my check till Monday, and in the interim will send you the amount in cash. I made a mistake in dating it to-day, as I did not expect to be in funds till Friday or Saturday. I regret I was not in when you called," &c.
"JOHN HILL."

The learned Judge was of opinion that these words were some evidence of an account stated; and he directed a verdict for the plaintiff for one shilling, reserving leave to move for a nonsuit. *Paterson*, in the ensuing term, moved accordingly, and cited *Kirton v. Wood*, 1 M. & Rob. 253, and *Teal v. Anty*, 2 Brod. & B. 99 (E. C. L. R. vol. 6). A rule nisi was granted.

*253] **Knowles* now showed cause.—It has indeed been laid down, in *Teal v. Anty*, 2 Brod. & B. 99 (E. C. L. R. vol. 6), and *Kirton v. Wood*, 1 M. & Rob. 253, that a plaintiff cannot recover on an account stated unless a definite sum has been found due; but those were cases in which substantial, and not merely nominal, damages were claimed. The letter here admits that something is due. [Lord CAMPBELL, C. J.—Is it stating an account to admit, generally, that a debt is due? ERLE, J.—If there were evidence that a balance was ascertained on a certain day, and that the defendant afterwards referred to that fact, and said, On such a day something was found due from me to you, and I will pay it, that, it seems to me, would show an account stated, though there were no proof of the amount found due.] Giving a check shows some balance to be due. [Lord CAMPBELL, C. J.—How could a recovery in this case be pleaded in bar to another action?] To the

amount of one shilling it might. [Lord CAMPBELL, C. J.—Suppose there were several actions: would it be an answer to each, as to one shilling?] The difficulty here is merely in assessing an amount of damages: but they must at least be nominal. In *Green v. Davies*, 4 B. & C. 235 (E. C. L. R. vol. 10), it was held that an acknowledgment of "some" interest being due, and a promise to bring it, was not an available admission, even to the extent of nominal damages: but the observation of Bayley, J. (delivering the judgment of the Court), was: "What the defendant said as to interest was an acknowledgment that there was some debt in existence, but what was the nature of that debt, whether it was due to the plaintiff in her character of executrix" "or in her own right, and whether it was one for which assumpsit *would lie, are questions upon which we are left entirely in the dark." Here [*254 the Court is not under the same difficulty.

Edwin James and Paterson, contra.—According to all the definitions of an account stated, it must be of a specific sum. Lord Mansfield says, in *Trueman v. Hurst*, 1 T. R. 40: "What is an account stated? It is an agreement by both parties that all the articles are true." One item may suffice; *Highmore v. Primrose*, 5 M. & S. 65; but one at least, to a given amount, must be agreed upon, and proof of the agreement given. [Lord CAMPBELL, C. J.—Certainly one item will constitute an account; but it is difficult to imagine an account without any item.] The ruling in *Kirton v. Wood* is expressly in point. Tindal, C. J., says: "On an account stated, you must show some precise sum." It does not appear that the plaintiff there would not have taken nominal damages; and in *Teal v. Auty* the plaintiff's counsel claimed to have "at least a nominal verdict." [ERLE, J.—Here a check is admitted to have been given; that showed an account stated, to some amount. Suppose a witness had heard the defendant say to the plaintiff that there was a balance due to him, but the witness could not swear to the amount named; would not this prove an account stated?] Legally, there is no check in existence here. In *Teal v. Auty* the defendant had been heard to admit (referring, as it seemed, to some written memoranda) that something was due to the plaintiff, which defendant promised to pay. The Court, however, said: "The promise to pay in the present [*255 *case was probably made with reference to the written memorandum, but that, not being stamped, could not be admitted in evidence:" and they held that the plaintiff was rightly nonsuited.

Lord CAMPBELL, C. J.—This rule must be absolute. The general admission of a pecuniary demand, not specifying the amount, is not an account stated. I should be sorry if there could be such a discrepancy between what is alleged in pleading and what is to be proved. The general understanding of an account stated is that the parties meet, agree that so much is owing, and so end the question between them: but I cannot imagine an account stated without a single specific item.

The words of the letter relied upon here do not furnish us with any item. The amount acknowledged may be one shilling or a thousand pounds. It is argued that the letter was evidence of an account having been stated; but I think it is not; at least for the purpose of entitling the plaintiff to recover on this count. It is not consistent with any of the authorities which have been referred to that there should be an account stated without one item of settled amount. It would lead to great inconvenience if even nominal damages could be given in such a case. Suppose a valid check had been given, but not proved: would a verdict for nominal damages, grounded on this letter, bar the plaintiff to the whole amount of the check? It is suggested that the bar might be pro tanto: but this would be full of inconvenience. I think, therefore, that there ought to have been a nonsuit or a verdict for the defendant.

*256] *WIGHTMAN, J.—“Account stated” seems almost *ex vi termini* to imply a definite arrangement. Here the amount agreed upon may have been 1000*l.* or 50*l.* The difficulty of recovering in another action if the verdict in this were pleaded in bar appears to me as my Lord has put it. And *Kirton v. Wood* is an authority in point.

ERLE, J.—I agree in the doctrine of the cases, but not in the conclusion which has been drawn from them. I think the evidence showed that an account was stated, and a definite balance found, namely, the amount for which a check was drawn. That amount, whatever it might be, and the sum to be awarded as damages, are different things. The check may be considered as lost: but there is a letter of the defendant referring to it, and showing that a definite sum has been found due, though the amount of it cannot now be fixed. That, I think, is a case for nominal damages. If another action were brought for any part of the demand here in question, it might be shown by averment that the plaintiff had recovered in this cause upon the same ground of action, and to what extent.

CROMPTON, J.—My impression is that a plaintiff cannot recover on an account stated unless he can show a precise sum agreed upon as due; and therefore that the plaintiff here cannot succeed.

Rule absolute.

*ANNE MEREDITH, Administratrix of MARY TURNER, v. RICHARD GITTINS. *April 15.* [*257]

In April, 1851, plaintiff recovered in a superior Court a sum under 40s. In June, 1851, he took out a summons before a Judge at Chambers, for costs, under stat. 13 & 14 Vict. c. 61, s. 13. The Judge, conceiving that, although concurrent jurisdiction was proved, he had a discretion as to making an order for costs, endorsed the summons with the words "no order." In January, 1852, plaintiff moved the Court of Queen's Bench to be allowed the said costs. Held, that the application must be considered as an appeal from the decision of the Judge at Chambers; and that it was made too late.

Per Lord Campbell, C. J.—Applications in the shape of an appeal from the decision of a Judge at Chambers should be made within the term next after such decision.

PIGOTT, in last term (28th January), obtained a rule calling on the defendant to show cause why the plaintiff should not be allowed the costs of this action, pursuant to stat. 13 & 14 Vict. c. 61, s. 13.

The affidavit on which the rule was obtained stated that the plaintiff, as administratrix of Mary Turner, together with the plaintiff's late husband, took out a writ in the Queen's Bench against the defendant, in 1851, to recover 2*l.* 8*s.* 8*d.* The plaintiff and her husband resided in Surrey, and the defendant in Montgomeryshire, where he carried on his business; so that, as was stated in the affidavit, the plaintiff and her husband were unable to sue the defendant in the county court within the jurisdiction of which they resided, or in any other county court within twenty miles of their residence. The cause was tried before the undersheriff of Montgomeryshire, in April, 1851; and a verdict was found for the plaintiffs for 13*s.* 3½*d.* The attorney for the plaintiffs applied to the undersheriff for a certificate to entitle the plaintiffs to costs, under stat. 13 & 14 Vict. c. 61, s. 12; but the undersheriff declined to certify on his own authority. On 11th June, 1851, an application was made before Coleridge, J., at chambers, *for an order for costs under stat. 13 & 14 Vict. c. 61, s. 13; and the learned Judge endorsed the summons "no order." [*258]

T. Jones now showed cause against the rule.—First, the Court has no jurisdiction to entertain this application, which is, in effect, an appeal from the decision of the Judge at chambers. Stat. 13 & 14 Vict. c. 61, s. 13, (a) provides that, if the plaintiff "shall make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a Judge at chambers upon summons," that the cause of action was one in which the superior Courts have concurrent jurisdiction, or for which no plaint could have been entered in any county court, "the Court," "or the said Judge at chambers, may," by rule or order respectively, direct that the plaintiff shall recover his costs. The jurisdiction of this Court, therefore, is only alternative; and it can entertain an application under this section only when such application is made in the first instance; not after a previous application by the

(a) See now stat. 15 & 16 Vict. c. 54, s. 4.

plaintiff to the other tribunal of which sect. 13 gives him the option. [Lord CAMPBELL, C. J.—Was an order refused at chambers on the ground that it had not been made to appear to the satisfaction of the Judge that the superior courts had concurrent jurisdiction in the case?] That does not appear to have been the ground: the learned Judge considered that the plaintiff, having recovered less than forty shillings, was precluded from recovering costs by stat. 43 Eliz. c. 6, s. 2. [Lord CAMPBELL, C. J.—Is that ground sufficient? According to *Jones v. Harrison*, 6 Exch. 328,† the Judge's power *to order costs, where *259] concurrent jurisdiction is proved to his satisfaction, is discretionary; but in *Crake v. Powell*, 2 E. & B. 210 (E. C. L. R. vol. 75), (Hil. Vac. 1852), we have decided, in accordance with the decision of the Court of Common Pleas in *Macdougall v. Paterson*, 11 Com. B. 755 (E. C. L. R. vol. 73), that he is bound, under those circumstances, to make the order.] If the plaintiff elects to go before a Judge at chambers, he cannot question the decision given there, or the grounds of such decision.

Secondly, the application, even it be one which this Court can entertain, is made too late; *Orchard v. Moxsy*, 2 E. & B. 206 (E. C. L. R. vol. 75). The application at chambers was made three terms back.

Pigott, *contra*.—In *Orchard v. Moxsy* the damages had been paid before the application for costs was made, so that there was greater necessity for despatch than in the present case. [Lord CAMPBELL, C. J.—The damages were accepted under protest.] The question, what is a reasonable time for making such an application as this, depends upon the particular facts of each case. In *Asplin v. Blackman*, 7 Exch. 386,† a delay of two terms was allowed.

Further, the application is not, as has been contended, by way of an appeal from the decision of the Judge at chambers. It is an application for a decision in the first instance, inasmuch as the learned Judge, conceiving that he had a discretion, as was held in *Jones v. Harrison*, 6 Exch. 328,† refused to make any order at all. [WIGHTMAN, J.—Is not “no order” equivalent to “summons dismissed?”] Not in the *260] present case, when the grounds upon which *the endorsement was made are considered. Those grounds were, not that concurrent jurisdiction had not been satisfactorily proved, but that the plaintiff was, as the learned Judge then conceived, precluded from recovering costs by the statute of Elizabeth. [Lord CAMPBELL, C. J.—A party must elect in which of the two forms he will make his application.] A habeas corpus may be applied for in all the three Superior Courts of record in succession. [Lord CAMPBELL, C. J.—That is a case *sui generis*.]

Lord CAMPBELL, C. J.—This application is made too late. We can hear it only in the shape of an appeal from the decision of the Judge at chambers. On the 11th June last, the summons at chambers was

endorsed "no order;" that is, as I understand it, equivalent to a dismissal of the summons. All Michaelmas Term elapses; and no application is made to us till the 28th January. It is a wholesome rule that any application to this Court in the shape of appeal from a decision of a Judge at chambers should be made within the term next after such decision. I do not think that we ought to take into consideration, as affecting the question of reasonable time, the various decisions in Westminster Hall upon the construction of stat. 13 & 14 Vict. c. 61, s. 13; for in that case a contrary decision, made seven years hence, might be come the ground of an application here, in the face of all intermediate decisions.

WIGHTMAN, J.—I am of the same opinion. There must be some limit to the time within which appeals against the decision of a Judge at chambers are to be made. I think this application is such an appeal, *and that the case must be governed by *Orchard v. Moxsy*, 2 E. [*261 & B. 206 (E. C. L. R. vol. 75).

ERLE, J.—I think it must be taken here that the words "no order" are equivalent to a dismissal of the summons. Sometimes they mean that the Judge does not choose to interfere. But here I think that the summons was so endorsed in the exercise of the Judge's jurisdiction under the statute, and that he must be considered to have refused the order. That being so, the application is clearly too late.

CROMPTON, J.—I am of the same opinion.—Under stat. 13 & 14 Vict. c. 61, s. 13, plaintiffs have the option of applying for costs either before this Court, or before a Judge at chambers. They must make their election; and, if they elect to go before a Judge at chambers, any subsequent application here, after his decision, is by way of appeal, and, as was decided in *Orchard v. Moxsy*, cannot be made after so long a time as has elapsed in the present case. In *Asplin v. Blackman*, 7 Exch. 386,† the application was made to the Court in the first instance, the Judge at chambers having adjourned the case thither.

Rule discharged.

*262] *THOMAS NEVE and Another, Executors, &c., of JOHN NEVE, v. JAMES HOLLANDS and MARY his Wife.

April 15.

Declaration against husband and wife, upon a joint and several promissory note made by the wife, before coverture, and one J. A., alleged a promise by the wife, *dum sola*. Defendant pleaded the Statute of Limitations. The declaration was amended, after issue, by inserting an allegation of a subsequent promise by the husband. Plaintiffs proved a payment of interest within six years, made by the wife after marriage, with money sent by J. A., but without the privity or subsequent ratification of the husband.

Held, that such payment raised no promise, either by the husband or the wife, so as to take the case out of the Statute of Limitations: inasmuch as, the wife being incapable of making any promise in law, express or implied, payment by her or the other joint maker of the note could create no promise on her part; and, as such payment was not made by the husband, or for any consideration affecting him, or with his sanction, it raised no implied promise on his part. Per Lord Campbell, C. J.: If the payment had been by the husband, or with his sanction, the declaration, as amended, would have been bad in arrest of judgment, as the wife would then have been improperly joined in the action.

THE first count of the declaration stated that the defendant Mary, while sole and unmarried, together with one John Ayton, on 24th June, 1837, made their promissory note in writing and delivered the same to the said John Neve, and thereby jointly and severally promised to pay him 50*l.* on demand with interest at 5 per cent.; "and the said Mary then promised the said John Neve to pay the same according to the tenor and effect thereof; [and, the same being due and unpaid, the said James Hollands, after the marriage of the defendants," "to wit, on 1st January, 1848," "promised the said John Neve to pay him the said moneys payable by the said note on request." (a)] The second count stated that the said Mary, while sole and unmarried, to wit, on, &c., was *263] indebted to the said John Neve in 100*l.* *on an account then stated between them; "and the said Mary, whilst she was sole and unmarried," afterwards, to wit, on, &c., "in consideration of the last-mentioned premises, promised the said John Neve to pay him the said last-mentioned sum of money on request; [and, the said sum being wholly due and unpaid, the said James Hollands, after the marriage of the defendants," "to wit, on 1st January, 1850, in consideration of the last-mentioned premises, promised the said John Neve to pay him the said last-mentioned sum of money on request:] yet the defendants have not, nor has either of them, paid the said several sums of money; and the same remain wholly due and unpaid.

Pleas; 1. To the first count, that the said Mary did not, whilst she was sole and unmarried, make the said promissory note, *modo et formâ*. Issue thereon.

2. To the residue of the declaration, that the said Mary, whilst she was sole and unmarried, did not promise, *modo et formâ*. Issue thereon.

3. To the whole declaration, that the causes of action in the declara-

(a) The declaration was amended, after issue, under a Judge's order, by inserting the words within brackets, in the first and second counts.

tion mentioned did not, nor did any of them, accrue within six years next before the commencement of this suit. Replication, that the said causes of action did accrue, &c. Issue thereon.

On the trial, before Erle, J., at the Middlesex sittings in Michaelmas Term, 1851, it appeared that, on 24th June, 1837, defendant Mary, then Mary Fowler, and unmarried, together with John Ayton, made the following promissory note :

“24th June, 1837.

We jointly and severally promise to pay to Mr. John Neve or order on demand fifty pounds with interest *for the same at £5 per cent. [*264 per annum for value received.

JNO. AYTON.

MARY FOWLER.”

£50.

Interest was regularly paid upon the note for six years. On each payment the note was endorsed by the payee with the date of payment and the following form of words, “Rec^d. a year’s interest, due 24th June, John Neve.” The defendant Mary married in 1843; and, on 10th August, 1844, without the knowledge of her husband, paid one year’s interest, with money sent on the part of Ayton, the note, on that occasion, being endorsed as follows: “August 10th, 1844. Paid Mr. Neve a year’s interest due 24th June last. Mary Hollands.” There were several subsequent endorsements like those previously made by the payee; but there was no evidence that the defendant James Hollands knew of any payment of interest, or of the existence of the promissory note, until this action was brought. John Neve died in 1849; and the action was commenced by his executors on 2d August, 1850. It was contended, on behalf of the defendants, that there was no evidence of any promise having been made by James Hollands, so as to take the case out of the operation of the Statute of Limitations, inasmuch as the payment of interest by his wife was made without his knowledge or authority; and, further, that, if such promise had been made by the husband, the wife was improperly joined. The jury found that the payment by the wife had not been made with the authority of the husband, or afterwards ratified by him. The learned Judge directed a verdict for the plaintiffs, leave being *reserved to move to enter [*265 a verdict for the defendants. *Bramwell*, in last Michaelmas Term, obtained a rule nisi to enter a verdict for the defendants or to arrest judgment.

Crowder and *F. Barrow* now showed cause.—The plaintiffs are entitled to the verdict. The action is against the husband and wife, for a debt contracted by the wife *dum sola*. At the time of the marriage, the note was overdue, and the Statute of Limitations had not begun to run against the wife, the original debtor. Then, by the marriage, the debt of the wife becomes also that of the husband; he is placed in the same position as if he had originally made the note jointly with his wife and

Ayton; and therefore payment of interest by the wife prevents the operation of the statute equally as regards the husband; *Whitcomb v. Whiting*, 1 Doug. 652. [WIGHTMAN, J.—Do you say that the promise by the husband, as alleged in the declaration, is supported by the wife's payment of interest?] The legal effect of such payment is to create an implied promise on the part of the husband. [Lord CAMPBELL, C. J.—There was no evidence here that the payment by the wife was ever authorized by the husband.] His authority is not necessary, where the debt is to be considered as the joint debt of both; *Burleigh v. Stott*, 8 B. & C. 36 (E. C. L. R. vol. 15). It is like the case of payment by one partner of a firm, in respect of a partnership debt, after dissolution of the partnership, and without the authority of the other partners; *Goddard v. Ingram*, 3 Q. B. 839 (E. C. L. R. vol. 43). [WIGHTMAN, J.—Supposing the payment by the wife to create an implied promise on *266] the *part of the husband, I do not see how the wife can be joined in an action founded upon such implied promise.] In an action founded upon a debt contracted by the wife *dum sola*, she must be joined, unless the husband has promised to pay on a consideration affecting himself only. *Mitchinson v. Hewson*, 7 T. R. 348, is in point. The declaration would have been good without the express allegation of a promise by the husband, which was introduced by amendment. But, as it now stands, the declaration accords with the result of the decision in *Morris v. Norfolk*, 1 Taun. 212. *Pittam v. Foster*, 1 B. & C. 248 (E. C. L. R. vol. 8), may be relied upon for the defendants. But there the action was against both the joint makers of the note and the husband of one; and the acknowledgment was not by the wife, but by the other joint maker, and was relied on as supporting the allegation of a promise made by him and the female defendant *dum sola*.

Bramwell, *contra*.—No action can be supported here against either or both of the defendants. *Tanner v. Smart*, 6 B. & C. 603 (E. C. L. R. vol. 13), establishes that the effect of payment, as regards the operation of the Statute of Limitations, is to create a fresh promise by implication. Now here the payment which is relied on was made after the marriage of the female defendant; it could therefore create no fresh promise on her part, as she had become incapable of making any promise at all. It could not create any promise on the part of the husband, because the payment was not made by his authority. If it had been so made, the jury might have inferred a promise by him in consideration of forbearance. But then the action *should have been against the *267] husband, only. *Pittam v. Foster* is directly to the point.

Lord CAMPBELL, C. J.—I am of opinion that, on the issue raised by the third plea, the defendants are entitled to the verdict. That issue is, whether or not the causes of action alleged in the declaration arose within six years from the commencement of this suit. The only causes of action alleged in the declaration at the time when issue was joined

were promises by the defendant Mary *dum sola*. The only evidence brought forward in support of these causes of action, for the purpose of taking them out of the operation of the Statute of Limitation, was a payment made by the defendant Mary in 1844, after her coverture. But such payment could not have the effect of a promise by her; for at that time she was incapable, as a married woman, of making any promise at all. Payment by or on behalf of Ayton would also fail, if made after her marriage, to create any liability on her part. Then, in the declaration, as amended after issue, there are two additional allegations of a promise by the defendant Mary's husband, after the marriage: and all that is brought forward in support of these allegations is the same payment by the defendant Mary in 1844, after her marriage. But it is clear that this would not support the promise by the husband, as laid; for the payment was not authorized by him at the time, or ratified by him afterwards. It is unnecessary to decide whether these amendments are good or bad, although, in my opinion, they are clearly bad, and, *if the payment had been proved to have been made with the husband's [268 authority, the declaration as amended would be bad in arrest of judgment, because the wife could not be joined under those circumstances. But, even supposing the amendments to be good, the plaintiffs have failed, under either form of the declaration, to support the issue raised by them upon the third plea. The rule must, therefore, be absolute to enter a verdict for the defendants.

WIGHTMAN, J.—I am of the same opinion. The action is brought upon a promissory note made in 1837 by the female defendant, *dum sola*, and another person; and the only promises alleged in the declaration, as it originally stood, were promises by the female defendant *dum sola*. The defendants pleaded the Statute of Limitations; and the plaintiffs, in order to take the case out of the operation of that statute, rely on a payment made by the female defendant after her marriage. But, as the declaration was originally framed, such evidence was wholly beside the issue, which was, whether any promise by the female defendant *before marriage* was made within six years before the action. Now she had been married more than six years before the action, and therefore had been, during all that time, incapable of making any promise. Then the declaration is amended by inserting allegations of a promise by the husband. But the issue raised by the plaintiffs upon that amendment could not be supported, inasmuch as the jury found that the payment by the wife after her marriage, which was relied on as supporting such issue, was made without the privity of the husband. The declaration, therefore, in *either shape, cannot be supported; and it is unnecessary to enter into the question whether [269 the declaration, as amended, is bad in arrest of judgment.

ERLE, J.—This action is brought upon a promise made by the defendant Mary Hollands *dum sola*; and the plaintiffs are bound to show that

such a promise was made within the last six years. The only promise which they show as made within the last six years is not such a promise, but a promise made by her after her coverture, when she was incapable of making any promise in law, express or implied. The promise by the husband, introduced into the declaration by amendment, is not the cause of action originally declared on, and is not a cause of action at all; for the payment relied on as creating such a promise by implication was not made by him, but was made by the wife without his privity or any subsequent ratification by him. The fact that it was made with the money of Ayton makes no difference in the question of the defendant Mary's liability: if she could not, by reason of her coverture, revive her liability by an express promise or a payment creating a promise by implication, neither could her liability be revived by a promise, express or implied, of her co-contractor.

CROMPTON, J.—This is an action against husband and wife jointly, on a promise made by the wife before her coverture. The plaintiffs are bound, therefore, to make out a joint liability of the defendants within six years, arising from such promise. But the only promise brought forward in support of such liability is a promise made by the wife *after* *270] coverture. That is, for the reasons laid down in *Pittam v. Foster*, 1 B. & C. 248 (E. C. L. R. vol. 8), no promise at all in point of law, and binds neither herself nor (since it was made without his privity or authority) her husband. The promise by the husband therefore, which was afterwards introduced into the declaration, has no existence, under the circumstances of the case. The plaintiffs, then, have failed, as it seems to me, in showing the liability of either the husband or the wife. The fact that the payment by the wife after marriage was made with the money of Ayton, the other joint maker of the note, was not relied on by the plaintiffs; and it is clear that no payment by or on behalf of him, after the marriage of the female defendant, could create any implied promise on her part, inasmuch as she was then incapable of making any promise, express or implied. The verdict must therefore be entered for the defendants.

Rule absolute to enter verdict for defendants.

A promise by husband and wife to pay a debt of the wife before marriage, which was barred by the statute, does not revive the debt on the death of the husband so as to give an action against the wife: *Kline v. Guthart*, 2 Penna. Rep. 490. And see also *Axson v. Blakeley*, 2 M'Cord, 6; *Powers v. Southgate*, 15 Vermont, 471.

A promise by a married woman to pay money borrowed by her as agent for her husband, will take the debt

out of the statute: *Burk v. Howard*, 13 Missouri, 241. Where to a plea of the statute of limitations, in an action against husband and wife for a debt contracted by the wife whilst sole, the plaintiff replies a subsequent promise by the defendants, it is necessary for him to prove a promise that is binding upon each, otherwise the issue is not sustained and he cannot recover: *Moore v. Le-seur*, 18 Alabama, 606.

The QUEEN v. CAUDWELL. *April 16.*

See 17 Q. B. 504, note (c) (E. C. L. R. vol. 79).

*BEAR and Others v. BROMLEY. *April 16.* [*271

Society consisting of more than twenty-five shareholders raised a fund by monthly subscriptions from each shareholder, out of which sums were occasionally advanced by way of loan, at 5 per cent. interest, to the highest bidder among the shareholders; the advance not to be less than 20*l.*, nor more than the amount subscribed for by him. The additional subscription paid by such highest bidder for the preference of having the loan was payable by monthly instalments; and fines were incurred in default of payment: the fines and monthly instalments, and the interest upon the loans, being added to the general fund of the Society. The repayment of the loans was secured to the Society in the names of three trustees.

Held, that the Society was not a joint stock company established "for any purpose of profit," within stat. 7 & 8 Vict. c. 110, s. 2, and might therefore make the loans in question without having obtained a certificate of complete registration.

ASSUMPSIT by payees against maker of a promissory note, dated 8th March, 1849, and payable to plaintiffs or their order, for 80*l.* with interest at 5 per cent. There was also a count on an account stated.

Fourth plea. That the consideration for the promissory note in the first count mentioned was money lent to the defendant by a Joint Stock Company, that is to say a partnership which before and at the time of the said lending consisted of more than twenty-five members, the said number not being caused by an admission subsequent on devolution or other act of law, which said Joint Stock Company had, before the said lending and after 1st November, 1844, to wit, on 1st September, 1848, been established at Colchester, in the county of Essex, for a purpose of profit, to wit, for the purpose of lending money at interest, and making profit thereby, and was not a banking company, school, or scientific or literary institution, or friendly society, or loan society, or benefit building society, nor incorporated by statute or charter, nor authorized by statute or letters patent to sue and be sued in the name of any officer or person. And defendant further says that in lending the said money to defendant the said Company acted otherwise than provisionally in accordance with the statute in such case *made, [*272 and that the said Company had not, at the time of lending the said money, obtained a certificate of complete registration as provided in and by the statute in such case made; but the said Company, at the time of the making the said note, to wit, on 8th March, 1849, illegally and contrary to the form of the statute in such case made, lent to defendant a certain sum of money, to wit, the sum of 80*l.*, out of the funds of the said Company, at interest, and with a view to the profit of the said Company, and in the course of carrying on the business of the said Company. And defendant further says that he made the said

note and delivered the same to plaintiffs, they then being the trustees of the said Company, and at the request of the said Company, and for their benefit, to secure to the said Company the payment of the money so lent and interest as aforesaid, and in consideration of the said loan, and without any other value or consideration. And

That the account stated, in the second count mentioned, was stated of and concerning the said moneys due on the said note and none other. Verification.

Replication, De injuriâ. Issue thereon.

On the trial, before Lord Campbell, C. J., at the last London sittings, it appeared that the Society consisted of more than twenty-five members, and had raised a subscription fund, kept up by monthly contributions, for the purpose of advancing portions of it, by way of loan, to the various members from time to time, at 5 per cent. interest.

The Society's list of rules was preceded by the following preamble:

"Whereas the several persons, members of this Society, whose names are inscribed in the book containing the amount of their shares therein, *have, for their *273] mutual benefit, by subscriptions every four weeks, raised a sum of money, and have agreed, by further monthly subscriptions, to be paid every Monday four weeks during the continuance of the said Society as after mentioned, to raise a further sum of money, with the intention of afterwards lending or advancing the same to some of the said parties at interest at the rate of 5*l.* for every 100*l.*, by the year, in the proportions, in such manner, and under such regulations, as are hereafter mentioned, so that every member of the Society shall have advanced or allotted to him on loan a sum of money as after mentioned."

The first rule of the Society provided for the place and times of meeting of the Society, and particularly that the thirteenth monthly meeting, from 11th September, 1848, should be a general annual meeting, at which no interest should be paid, but all sums on whatever account due from members should be paid.

The rules then went on to provide officers for the Society, and the mode of their election, &c.; and that the secretary should keep accounts, which should be open to the inspection of all the members at the monthly meetings.

By rule 4 a committee of seven was to be chosen from the members, which might accept either real or personal security for the money advanced to the members, and approve or disapprove of the securities proposed for securing the money allotted to them out of the fund of the Society.

Rule 7 was as follows:

"Every member of this Society, his executors or administrators, shall pay to the president or his deputy, or person acting as such, at every monthly meeting, during the first hour of business, viz., from seven to eight o'clock, two shillings and six pence upon every ten pounds for which he shall subscribe; and when he shall have a loan or allotment of money from the fund or stock of the club, he shall also pay the additional subscription he shall agree to give for the preference of having such

loan, by monthly instalments of two shillings upon every ten pounds so advanced or allotted to him, until the whole of such additional subscriptions shall be paid, together with interest for such loan or sum so advanced, after the rate of 5*l.* for 100*l.* by the year."

*Rule 8 imposed certain fines for non-payment of subscriptions and arrears. [*274]

By rule 11 it was declared that

"When the treasurer shall have in hand, at any of the monthly meetings, the sum of 20*l.* of the money so subscribed at any of the monthly meetings, the same shall be put up for sale, the highest bidder to be the purchaser; and he may have from the fund any sum not less than 20*l.* (except by the consent of the committee), nor more than the sum he subscribed for. He shall at the same time inform the secretary what sum he will take, and within one day inform the secretary in writing, the names, trades, and places of abode of the persons he may purpose as sureties for the money, or the nature and particulars of any other security he may purpose to give; and upon giving approved security to the committee of the Society for the same, shall have such advance or allotment of money paid to him by the treasurer, on paying the stamp duty upon the security given and entered into by him and his sureties, or the expense of such other security as may be accepted. Any person shall be at liberty, with the sanction of the committee, to take by purchase to the amount of subscriptions paid by him to the Society in sums not less than 20*l.*, without giving security on stamp. Should there at any time be no bidders, the money in hand shall be allotted by ballot. The first drawn shall take the amount of his share on his own security, at interest, without stamp, to the amount of subscription paid by him to the Society; but above the amount he must give security to the satisfaction of the committee; and if the person drawn does not take all the money, to continue drawing till disposed of. If any member does not take the money he agreed to have at any monthly meeting, he shall pay, at the next monthly meeting, one month's interest on the sum he so agreed to take, and also whatever sum may be deficient in the additional subscription which shall be agreed to be given at the next monthly meeting, when the same shall be disposed of. All moneys that shall from time to time be disposed of by way of sale shall be secured to the Society in the names of three persons, to be appointed by the Society, to be called trustees; and it shall not be necessary that such persons be members of the Society. And if a member of the committee or officer becomes a purchaser of any loan of money, such member shall not be present while his sureties shall be taken into consideration. Should any member purchasing from the funds of the society, or either of his sureties, die, become bankrupt or insolvent, depart the country, or compound with his creditors, the committee may, if they think proper, require additional security, or take such other means to obtain payment of the amount due to the Society on the note given as they may deem fit."

By rule 14 it was declared that

"All monthly and additional subscriptions, interests, fines, forfeitures (except fines of the committee-men for neglecting to attend the monthly *meetings of the committee at the time appointed), extra and other payments, shall be paid [*275 to the treasurer, and shall constitute and be the fund or stock of the Society; and all expenses incurred by the treasurer, the secretary, the committee, or any other member of the Society, in or about the affairs and concerns of the Society under the direction and authority of any monthly or special general meeting of the committee, shall be paid out of the fund or stock."

By rule 15 it was declared that

"Immediate payment shall be made to the treasurer of all sums for which the

members are, or shall be, liable on any note, or under these or any other subsequent rules, orders, or regulations, to be duly made; and which sums shall be recoverable by law as liquidated damages; or the treasurer, at his option, may retain and deduct the same from any money in his hands which shall have been subscribed by the person from whom such payments are to be made."

Two shares in the Society had been put up to auction, and bought by the defendant, who gave the promissory note in question as security for payment. The learned Judge directed a verdict for the plaintiffs upon all the issues, with leave to move to enter a verdict for the defendant upon the fourth issue.

Horn now moved accordingly.—The Society is clearly a joint stock Company established for a purpose of profit within the operation of stat. 7 & 8 Vict. c. 110, as defined by sect. 2. *Silver v. Barnes*, 6 New Ca. 180 (E. C. L. R. vol. 37), shows that, where the members of a benefit society raise a joint stock fund, portions of which are from time to time advanced to members of the society by way of loan, each loan being put up to competition and given to the highest bidder, such advances are to be considered as dealing with the funds of the partnership, and not as mere loans. *Beaumont v. Meredith*, 3 Ves. & B. 180, is also in point. And the partnership here is clearly established for the *276] purpose of profit. [WIGHTMAN, J.—The members stand as they began: all the funds must be divided.] Some of the members gain at the expense of others. [Lord CAMPBELL, C. J.—Suppose this were a corporate body: has the body any profit?] That can hardly be considered the criterion: but if it be, the doctrine in *Silver v. Barnes* applies. [ERLE, J.—*Silver v. Barnes* is decisive against you on that point.] It decides that, although a loan of this nature is not usurious, it is, in effect, a dealing with a partnership fund. [ERLE, J., cited *Regina v. Whitmarsh*, 15 Q. B. 600 (E. C. L. R. vol. 66).] In that case the Court decided that, where powers were given to a joint stock Company to purchase and sell land, as subsidiary to the governing purpose of providing allotments for the members, the fact of profits accidentally arising from such purchases or sales did not bring the company within stat. 7 & 8 Vict. c. 110, s. 2, the profits not being the purpose for which the company was established. [ERLE, J.—In fact, by profit, in stat. 7 & 8 Vict. c. 110, s. 2, is meant profit arising from others, not profits or advantages raised from, and accruing to, only the members of the company. The latter can hardly be excluded from the definition. Building societies are expressly exempted by sect. 2, which would not have been necessary if the meaning of a society "established for any purpose of profit" were restricted as is suggested.]

Lord CAMPBELL, C. J.—The point is one which is worthy of being considered; but it has already been argued and decided in *Regina v. Whitmarsh*. The question is, whether the Society, as such, is established

for a purpose of profit: the fact that the individual *members may be losers or gainers is immaterial. That may be the case [*277 here; but it is clear that the Society itself does not derive a profit from its transactions. It is not, therefore, within the meaning of stat. 7 & 8 Vict. c. 110, s. 2.

WIGHTMAN, J.—The allegation as to profit which the plea introduces is not proved. The case is precisely similar to *Regina v. Whitmarsh*.

ERLE, J.—The transactions of the Society are by virtue of powers which are only subsidiary to a general purpose, and that not a purpose of profit. Profits arising from such transactions are not profits to the Society within the meaning of stat. 7 & 8 Vict. c. 110, s. 2.

(No fourth Judge was present.)

Rule refused.

WALKER and Others v. The BRITISH GUARANTEE ASSOCIATION. *April 17.*

The treasurer of a Benefit Building Society within stats. 6 & 7 W. 4, c. 32, and 10 G. 4, c. 56, having covenanted with the Society's trustees that he will faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duties, and punctually account to the trustees for all and every sum and sums of money, bills, notes, securities, goods, and chattels, which he, in his office of treasurer, shall receive on the Society's account, and being bound, by the rules of the Society, to pay over in a given time the same moneys which he shall receive, does not violate such obligation if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence and without fault of his own; such obligation being that only of a bailee.

So held in an action by trustees of such Society against sureties of a treasurer, complaining that he had not paid the said moneys, to which the sureties pleaded such robbery, committed upon their principal, in excuse of his non-payment.

COVENANT. The plaintiffs, stating themselves to be trustees of The Lancashire & Yorkshire Benefit *Building Society, and authorized, according to the statutes in that case made, &c., to sue on behalf [*278 of that Society, declared against the British Guarantee Association: For that, whereas the said Society, before and at the time of the making of the policy after mentioned, was, and from thence continued, &c., and still is, a Benefit Building Society established under an Act, &c. (6 & 7 W. 4, c. 32, "for the regulation of benefit building societies"): And whereas, &c.: the declaration then averred that, at the time of the making of the policy, the rules of the Society had been duly certified, enrolled, &c., according to law, and the Society then was, and from thence hitherto hath been and still is, entitled to the benefit of the said acts of parliament: And thereupon, by a certain deed and policy of guarantee made 27th December, 1849, between James Jones of the first part, defendants of the second part, the plaintiff Walker and others (named), as, and then being, the trustees of the Society, of the third part (profert), after reciting, as the fact was, that James Jones had been appointed treasurer to the said Society, and that, he having been required

to find security for the due and faithful discharge of his duties whilst he should be employed as such treasurer to the said Society, the defendants at the request of the said J. J., and in consideration of the annual sum or premium of 12*l.* 10*s.* to be therefore paid by the said J. J. to the defendants, had covenanted to give such security upon the terms, &c., therein-after mentioned, and the said J. J. had agreed to enter into the covenants therein contained: It was witnessed that the defendants thereby covenanted with the trustees in the said policy mentioned that J. J. should and would from time to time, and at all times thereafter whilst he

*279] *continued in his said office and employment, duly and faithfully discharge all and every the duties of his said office and employment, and in all things and at all times faithfully and duly obey the directions and instructions of the said then trustees, and of the trustees for the time being of the said Building Society, in all particulars in relation to the duties of his situation, and in particular should and would faithfully, honestly, and punctually account to the said then trustees, and to the trustees for the time being of the said Society, for all and every sum and sums of money, bank notes, drafts, bills of exchange, promissory notes, or securities for money, goods and chattels, which he the said J. J., whilst acting in his said office or employment, should from time to time receive on account of the said then trustees, &c. And also that he the said J. J., his executors or administrators, should from time to time, upon request or demand, give in or deliver up true and perfect accounts in writing of all moneys received by him, and of all payments made by him thereout as such treasurer as aforesaid, or in such office or employment as aforesaid, to the said then trustees, &c., or to such person or persons as should be by them appointed to receive the same. And that J. J., his executors, &c., or the defendants, should from time to time, &c., indemnify the then trustees and the trustees for the time being of the Society from all loss, &c., which they or the Society might sustain, or which might be occasioned, by or through the acts or defaults of the said J. J. whilst in his said office or employment, or for or by reason of the breach by the said J. J., his executors, &c., of any of the covenants therein contained, and generally for or by reason of any and every failure of whatever nature on the part of the

*280] said *J. J. rightly to discharge the duties of his said office or employment. Then followed a covenant that the Association should be liable for any such loss or damage in the event only of the trustees giving the defendants a certificate or statement in writing of any such loss or damage within fourteen days after the same should have come to their knowledge; stipulations as to the mode of certifying; and covenant that, from and after the delivery of any such certificate or statement to the defendants, the defendants should ipso facto and without any notice or intimation whatever be deemed to be discharged from the obligation thereby undertaken, so far as regarded the

acts and defaults of the said J. J. subsequent to the delivery of such certificate: conditions, not material here, as to the claim and payment in respect of any such loss or damage: covenant that the Association, in its individual members or its funds, should not be liable under his policy to pay to the trustees beyond the amount of 1000*l.*: and covenant for cessation of the guarantee on default by J. J. in paying defendants the yearly premium of 12*l.* 10*s.*, or if defendants should give notice (as the covenant specified) of their intention to determine the guarantee.

The declaration then alleged that J. J. continued to be and was treasurer of the Society from the time of the making of the said policy to the commencement of this suit, that he duly paid his premiums, and that the policy continued in force from the making thereof until at and after the time of the loss and of the statement of particulars in writing, after mentioned: And that, after the making of the policy, and before 30th November, 1851, and while plaintiffs were the trustees for the time being of the said Society, viz., on 30th April, 1851, the said [*281 J. J. actually received, as such treasurer as aforesaid, and in the discharge of his duty as such treasurer, certain moneys of the said Building Society, amounting to 170*l.*, on account of and for the use of the said Society: and, although the said J. J., according to the rules of the said Society, and the directions of them the plaintiffs, as such trustees as aforesaid, and in the due and faithful discharge of his duty as such treasurer, as he the said J. J. then well knew, could and might and ought to have paid over the same moneys to the bankers of the said Society, to wit, to The National Provincial Bank of England, at their branch bank at Manchester, to the credit of the plaintiffs as such trustees as aforesaid, within a short time after he had received the same, to wit, during the then next day; yet the said J. J. did not within such last-mentioned time or at any other time pay the said moneys or any part thereof to the said bankers of the said Society, but wholly omitted and neglected so to do, contrary to his duty as such treasurer of the said Society as aforesaid. And, although the said J. J., after he had so omitted to pay the said moneys, &c., as aforesaid, and before the giving the statement of the particulars of loss hereinafter mentioned, and before 30th November, 1851, to wit, on 2d May, 1851, was requested by the said Society, and by the plaintiffs as such trustees as aforesaid, to pay plaintiffs as such trustees the said moneys which had been so received by J. J., &c., and which moneys he the said J. J. was then bound in the due and faithful discharge of his duty as such treasurer to have paid to plaintiffs as such trustees, and although a reasonable time for the said J. J. to have paid the said moneys to plaintiffs as such trustees, &c., had elapsed before the giving by plaintiffs of the notice *of loss after mentioned: Yet, &c.; allegation that J. J. [*282 did not pay the said moneys or any part thereof to the Society

or to plaintiffs, but wholly neglected, &c., and therein wholly failed, &c.; and thereby, and by reason of the said acts and defaults of J. J. as such treasurer, the said moneys then became and were and still are wholly lost to the said Society and to plaintiffs as such trustees as aforesaid. The count then averred due notice to defendants of the loss, with other allegations necessary to the establishment of their claim according to the above-recited covenants; and stated, as breach, that defendants had not paid the amount of the said loss or any part thereof, nor indemnified the Society, or plaintiffs as trustees.

Pleas: 1. Non est factum. Issue thereon. 2. Denial of the receipt of the moneys by J. J. as treasurer: conclusion to the country. Issue thereon. 3. Payment of the moneys by J. J. as treasurer: conclusion to the country. Issue thereon. 5. Omission of plaintiffs to give a certificate, as required by the deed, within fourteen days after knowledge of the alleged loss: conclusion to the country. Issue thereon.

The fourth plea was as follows.

That, after the said James Jones, as such treasurer as aforesaid, had received the said moneys as in the declaration in that behalf mentioned, and before the said time at which he ought to have paid or could have paid the same to the said bankers of the said Society as in the said declaration in that behalf mentioned, to wit, on the 30th day of April, A. D. 1851, the said J. J., without any act or default of him the said J. J., or any negligence or want of due or proper care by or on the part of him the said J. J., was robbed by violence of the whole of *283] *the said moneys, to wit, by the same being then feloniously and violently stolen, taken, and carried away from the person and against the will of the said J. J.; and thereby the said J. J. was unavoidably, without any act or default of him the said J. J., prevented from paying, and could not pay, the said moneys to the said bankers of the said Society. Verification. Replication, De Injuriâ. Issue thereon.

On the trial, before Cresswell, J., at the last Liverpool Spring Assizes, a verdict was found for the defendants on the 4th issue; for the plaintiffs on all the others; and the damages were assessed contingently at 161*l.* 16*s.* 2*d.*

Knowles now moved (a) for judgment non obstante veredicto.—The fourth plea is no answer. The declaration charges Jones with having received moneys as treasurer “on account of and for the use of” the Society: and the defendants had covenanted that he should faithfully account to the trustees for all moneys so received. The allegation now made, of a loss by robbery, is not such an accounting. The duty is, not merely to render an account, but to pay. Money, once received by the treasurer on the Society’s behalf, constitutes a debt, which is not discharged by the debtor’s loss, however unavoidable. The Legislature has given sanction to societies of this kind for purposes of public bene-

(a) Before Lord Campbell, C. J., Wightman, Erie, and Crompton, J.

fit, as appears by the preambles to stat. 6 & 7 W. 4, c. 32, s. 1, and to sect. 2 of stat. 10 G. 4, c. 56, which statute, so far as it is applicable, is incorporated with stat. 6 & 7 W. 4, c. 32, by sect. 4 of that Act. The treasurer *is treated as a debtor by stat. 10 G. 4, c. 56, s. 20; (a) and precedence is there given to the demands of the Society over "any of his or her other debts." And, by sect. 22, it is provided: "That the said treasurer, trustee, and every other the officer of any such Society, shall be and they are hereby declared to be personally responsible and liable for all moneys actually received by him, her, or them on account of or to and for the use of the said Society." Even if his liability were that of a bailee, it could not be less than that of a carrier or an innkeeper; and, where they would be liable in respect of money or goods lost by robbery, he is. [Lord CAMPBELL, C. J.— You go the length of contending that, if a person exercising this kind of function has ear-marked money of the Society taken from him forcibly by robbers, he is liable. You would say that, if he held a bank note of the Society, and some one laid hands upon it and burnt it, or if he were carrying a bag of their money and it were swallowed up by an earthquake, his estate must make it good.] If he is a debtor, these accidents would not excuse him. The intention of the statutes is, at all *events, to protect the funds of poor people intrusting them to these Societies, and to take from their officer the possibility of alleging that he is merely a servant. Everything necessary to make the treasurer personally liable is found for the plaintiffs by this verdict.

Cur. adv. vult.

Lord CAMPBELL, C. J., on a subsequent day of the term (April 20th), delivered the judgment of the Court.

We are of opinion that in this case there ought not to be a rule for judgment for the plaintiffs non obstante veredicto, as we consider the plea found for the defendants to be clearly a sufficient answer to the action. The condition of the bond is, that James Jones should duly and faithfully discharge the duties of his office of treasurer to the Building Society, and obey the directions of the trustees, and duly account to the trustees for money, goods, and chattels, which he might receive on account of the trustees. The declaration alleges that James Jones, as such treasurer, received 170*l.*, the moneys of the Society, and

(a) Stat. 10 G. 4, c. 56, s. 20, enacts: "That if any person appointed to any office by any such society, and being intrusted with or having in his or her hands or possession, by virtue of his or her said office, any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, his or her executors or administrators or assignees, or other persons having legal right, shall, within forty days after demand made by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver over all things belonging to such society to such person as such society shall appoint, and shall pay, out of the estates, assets, or effects of such person, all sums of money remaining due which such person received by virtue of his or her said office, before any of his or her other debts are paid or satisfied; and all such assets, estates, and effects shall be bound to the payment and discharge thereof accordingly."

that, according to the rules of the Society and the directions of the trustees, he ought to have paid over the *same moneys* to the bankers of the Society, to the credit of the plaintiffs, within a short time after he received the same, viz., during the then next day; yet that he had not done so, nor had he ever paid the same; whereby the said moneys became and were lost to the Society.

It is here charged that he was a bailee of specific moneys; which identical moneys it was his duty to carry and deliver to the bankers of the Society.

The plea avers that, after he had received the moneys, and before
 *286] the time when he ought to have paid, or *could have paid, the same to the bankers, he, without any default or negligence or want of due care on his part, was robbed by violence of the whole of the said moneys, by the same being feloniously and violently stolen and carried away from his person; and thereby he was unavoidably, and without any act or default of his, prevented from paying the said moneys to the bankers of the Society.

This plea (found to be true) alleges a loss of the moneys by *irresistible violence*; and the general doctrine is not denied, that, if the subject-matter bailed be lost by *vis major*, which we translate *irresistible violence*, the bailee is discharged. If James Jones, the principal, was guilty of no default, the defendants, as his sureties, cannot be liable. Reliance however is placed on stats. 6 & 7 W. 4, c. 32, s. 4, and 10 G. 4, c. 56, s. 22, by which it is said that, as soon as the treasurer of such a Society receives any money on account of the Society, he *eo instanti* becomes a debtor to the Society; so that payment alone can discharge him from his liability. But we think this must be confined to such moneys received by him as he might use as his own, he being at liberty to pay the debt with other moneys. He cannot, in respect of one receipt by him as treasurer, be considered at the same time as bailee of specific, ear-marked, moneys, and a debtor to the same amount with the power of discharging his engagement by payment of an equivalent sum from any source, or in any denomination of coin, or in any paper securities which pass as cash. According to the averment in this declaration, James Jones was undoubtedly bailee of the 170*l.*; and therefore he was not a debtor to that amount. As bailee, the true relation in which he
 *287] stood to the Society, he was *discharged by the robbery. If this were not so, his liability would be greater than that of a common carrier; for he would not even be discharged by the act of God or of the Queen's enemies; and indeed Mr. Knowles was driven to contend that, if, while carrying to the bankers a bag of gold representing the 170*l.* within a few minutes after receiving it, an earthquake had swallowed it up, he still would have been debtor to the Society for the amount. But we are of opinion that the statutes relied upon were not

intended to cast such an extraordinary liability upon an officer of such a Society, or upon his sureties.

Entertaining no doubt upon these points, we think that Mr. *Knowles* should take nothing by his motion. Rule refused.

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The Company of Proprietors of The ROCHDALE Canal v. RAD-
CLIFFE. April 17.

A company established, by stat. 34 G. 3, c. 78, for making and maintaining a certain navigable canal; and, by sect. 113, reciting that the erection of steam-engines near to the navigation might promote its interests, it was made lawful for the owners of lands within twenty yards of the canal to draw off water sufficient to supply such engines *for the sole purpose of condensing the steam used for working them*; such water to be returned into the canal (allowing for inevitable waste), so that no obstruction should arise to the navigation.

The Company sued R. in case, for that he, being possessed of land within twenty yards of the canal, and of a mill and steam-engine on such land, drew water from the canal more than sufficient for the sole purpose of condensing, &c., and used the same for other purposes than that of condensing, &c., whereby plaintiffs lost and were deprived of the water. Plea, that defendant was tenant of land situate, &c., and abutting, &c., and was the occupier of a *certain mill erected on the said land and abutting on the canal, and of a certain steam-engine in the said mill, being the land, mill, and engine mentioned in the declaration*: and that defendant and all occupiers of the said land, mill, and engine had for twenty years used as of right, &c., the easement of drawing from time to time from the canal such quantities of water as were necessary, for other purposes than that of condensing, &c., to wit, for the purposes of supplying the boilers of the engine with water, of generating steam to work the engine, of heating the said mill, of cleansing the boilers, and of supplying water to a certain cistern, *to wit, a cistern on the roof of a certain engine-house on the said land*: and that defendant, in exercise of his said right, drew off the water at the times when, &c., for the purposes aforesaid. Replication, traversing the enjoyment and right as alleged. Issue thereon. It appeared in evidence that a mill of the defendant called The Old Mill, with a steam-engine, abutting on the canal, had existed more than twenty years; that within twenty years a new mill, with another engine, had been erected, adjoining to and communicating with the Old Mill, water passing from one to the other, and the machinery of one being worked by power from the other: and that the water of the canal had been used in both mills (in the Old during more than twenty years), for the purposes mentioned in the plea except that of supplying a cistern on the roof of the engine-house; there being no cistern in that place. The jury found (in answer to questions put by the Judge) that the buildings constituted one mill, and that the user proved had been as of right; and a verdict was taken for the plaintiffs. On motion to enter a verdict for defendant:

Held, that the justification in respect of "a certain mill" was supported by the proof of defendant having occupied and used the water for the Old mill during twenty years: and that if plaintiffs meant to rely upon the more modern user in the new mill, they should have new assigned. And

That the failure of proof as to the cistern did not entitle the plaintiffs to an entire verdict on the issue joined, but that the verdict might be entered distributively, with nominal damages for the user not justified in proof.

The plaintiffs moved for judgment non obstante veredicto on the same issue, and relied upon the above Act and others establishing and regulating their canal, which gave the public a right, for the purposes of the navigation, to use the canal and the adjoining wharfs and ways, paying certain rates, empowered the company to raise money on the security of such rates, and obliged them to convey all their waste water into the Duke of Bridgewater's Canal.

Held, that the Company could not, consistently with these enactments, have granted the water for other purposes than that permitted by stat. 34 G. 3, c. 78, s. 113: that an actual grant, if proved, for the purposes mentioned in the plea, would have been illegal and no justification: and, therefore, That the grant for such purposes, implied from twenty years' user, was no legal defense to this action. Judgment for plaintiffs, non obstante veredicto.

CASE. The action was commenced in June, 1848. The first count

*288] stated: That, after the passing of a *certain Act, &c., 34 G. 3, c. 78, (a) "for making and maintaining a navigable canal from the Calder Navigation, at or near Sowerby Bridge wharf, in the parish of Halifax," &c., "to join the canal of his Grace the Duke of Bridgewater, in the parish of Manchester," &c., "and also certain cuts from the said intended canal," and before and at the time of the committing, &c., and *289] from *thence hitherto, the plaintiffs had been and were lawfully possessed of a certain canal and also a certain cut for the navigation of boats, barges, and other vessels, branching from the said canal at or near a certain place called, &c., in the township of Castleton in the parish of Rochdale to or near a place called, &c., in the same township and parish, the said canal and cut consisting of and being, during all the time aforesaid, land covered with water, and continuing and being during all the time aforesaid a navigable canal and cut respectively, and respectively made after the passing of the said Act and long before the committing, &c., by the plaintiffs by virtue and in pursuance of and according to the powers and provisions in the said Act contained, and, before and at the time of the committing, &c., continuing to be and being such navigable canal and cut respectively maintained by the plaintiffs under and by virtue of the powers of the said Act for the purposes in the said Act specified: The count then alleged that defendant was possessed of certain lands within twenty yards of the said cut, and of a mill, and steam-engine for working the same, upon the said lands, and of certain pipes, &c., and that he drew off water from the canal by the said pipes, and wrongfully and against the form of the statute, &c., used the said water for other purposes than were allowed by law. It is unnecessary to state more of this count. Plea 1, to the first count, alleged a twenty years' user in right of premises situate in Richard Street in the parish of Rochdale. The plaintiffs new assigned; the defendant demurred generally to the new assignment; and judgment was given for the plaintiffs on the demurrer.

Second count. That, whereas, after the making of the said act of *290] parliament, and before and at the time of the *committing, &c., and from thence hitherto, the plaintiffs had been and were lawfully possessed of the said canal and cut in the said first count mentioned, the same canal and cut consisting of and being, during all the time in this count aforesaid, land covered with water, and continuing and being during all the time last aforesaid a navigable canal and cut respectively, and respectively made, after the passing of the said Act and long before the committing, &c., by the plaintiffs, by virtue and in

(a) By sect. 1, after a recital that the making of a navigable canal and cuts as there described will tend to promote the trade, &c., of the kingdom, and be in other respects of great public utility, certain persons named, and their successors, &c., are "united into a company for the making, completing, and maintaining the said navigable canal and cuts, according to the rules, orders, and directions hereinafter expressed," and are for that purpose to "be and become one body corporate, by the name of The Company of Proprietors of the Rochdale Canal," &c.

pursuance as aforesaid, and, before and at the time of the committing, &c., continuing to be and being such navigable canal and cut respectively maintained by the plaintiffs as aforesaid. And whereas also, before and at the time of the committing, &c., the defendant was and still is possessed of certain lands within the distance of twenty yards from the said cut, and of a certain mill and a certain steam-engine then being on the said lands, the same engine being, before and at the time of committing, &c., erected and used by the defendant for the purpose of working the said mill: Nevertheless the defendant wrongfully and injuriously deceived and defrauded the plaintiffs in this, to wit, that defendant heretofore, to wit, on 1st January, A. D. 1846, and on divers other days, &c., wrongfully and injuriously, and against the form of the statute in such case, &c., drew, abstracted, and diverted from the said cut, by and by means of divers, to wit, five drains and five sluices, divers large quantities of water, the same being more water than sufficient to supply the said engine on each or any of the said days or otherwise with cold water for the sole purpose of condensing the steam used for working the said engine; to wit, 100,000 tons more on each of the said days than was sufficient as aforesaid. And plaintiffs *fur- [291
ther say that defendant further wrongfully and injuriously de-
ceived and defrauded the plaintiffs in this, to wit, that defendant heretofore, to wit, on, &c., and on divers other days, &c., wrongfully and injuriously and against the form of the statute in such case, &c., used and applied divers large quantities of water, to wit, 100,000 tons, theretofore drawn as in this count is aforesaid by him the defendant from the said cut, to other and different purposes and uses than the condensing the steam used for working the said engine; whereby the plaintiffs lost and were deprived of the said water. To the damage of the plaintiffs of 100*l.*, &c.(a)

Plea 2, to the second count, Not Guilty. Issue thereon.

Plea 3, to the same, so far as it related to using the water for other and different purposes, &c.: That the water mentioned in that part of the count to which the plea is pleaded was not drawn from the said cut in the second count mentioned in manner and form, &c. Conclusion to the country. Issue thereon.

Plea 4, to the same count: That, before and at the time of the committing, &c., defendant was, and thence hitherto hath been, and still is, the occupier of certain lands as tenant thereof under and by virtue of a certain lease to him thereof for a certain term, to wit, for a term of seven years from, &c., by a certain indenture, &c., to wit, of four acres of land situate, lying, and being in a certain street called Richard Street in the parish of Rochdale in the county of Lancaster, and abutting eastwardly on the said cut so in the possession of the plaintiffs as

(a) See Rochdale Canal Company v. Walmesley, 14 Q. B. 134, note (c) (H. C. L. R. vol. 68).

*292] in the said second count is mentioned: and *that defendant, at the said several times when, &c., was, and thence hitherto hath been, and still is, the occupier of a certain mill, erected and being upon the said lands hereinbefore mentioned, and abutting eastwardly on the said last-mentioned cut, and of a certain steam-engine in the said mill; the said lands, mill, and steam-engine in this plea aforesaid being the lands, mill, and steam-engine in the second count of the declaration mentioned: and that the said cut in the said second count mentioned had been and was continually for a long space of time, to wit, for the space of fifty years next before the commencement of this suit, connected with the said lands, mill, and steam-engine in this plea aforesaid by means of divers, to wit, five, drains, and divers, to wit, five, sluices, being the drains and sluices in the said second count mentioned: and that defendant, whilst such occupier as in this plea aforesaid, and all occupiers for the time being of the said lands, mill, and steam-engine in this plea aforesaid, have, and each of them hath, whilst such occupier and occupiers as in this plea aforesaid, as of right and without interruption, for and during the full period of twenty years next before the commencement of this suit, had, used, exercised, and actually enjoyed, and have, and each of them hath, been used and accustomed, whilst such occupier and occupiers, &c., as of right and without interruption for and during the full period of twenty years in this plea aforesaid, to have, use, &c., and of right ought, &c., for and during the full period of twenty years in this plea aforesaid, as of right and without interruption, to have had, used, &c., and the defendant so being such occupier as in this plea aforesaid, at the said several times when, &c., of right ought to have had, used, &c., and still of right ought to have, *293] *use, &c., for himself and themselves respectively, whilst occupier and occupiers of the said lands, mill, and steam-engine in this plea in that behalf aforesaid, the right, privilege, and easement of drawing from time to time, as of right and without interruption, from and out of the said cut in the said second count mentioned, to wit, through and by means of the said sluices and drains in the said second count mentioned, and of using and applying, as of right and without interruption, for and to other and different purposes and uses than the purposes and uses of condensing the steam used for working the said engine in the said second count mentioned, to wit, for and to the purposes and uses of supplying the boilers of the said engine in the said second count mentioned with water, and of generating steam for working the said last-mentioned engine, and of heating the said mill in the said second count mentioned, and of cleansing the said boilers, and of supplying with water a certain cistern, to wit, a cistern on the roof of a certain engine-house on the said lands in this plea aforesaid, such quantities of water as were from time to time necessary and required by the said occupiers for the time being of the said lands, mill, and steam-engine in this plea

mentioned for the said several purposes and uses in this plea in that behalf aforesaid, as and when the said last-mentioned quantities were necessary and required for the said several last-mentioned purposes. The plea then stated that defendant, at the times when, &c., being such occupier, &c., and so entitled, &c., as in this plea aforesaid, and having, at the several times when, &c., occasion, &c., to draw and use a large quantity of water, to wit, 100,000 tons of water, for the purposes and uses for which he was at the said *several times when, &c., in the said second count mentioned so entitled to draw and use the [*294 same as in this plea aforesaid, being other and different purposes and uses from and than the sole purpose of condensing the steam used for working the said engine in the said second count mentioned, to wit, for the purposes and uses in this plea in that behalf aforesaid, the said last-mentioned quantities being, at the said several times when, &c., in the said second count mentioned, quantities necessary in that behalf and required by the defendant, so being such occupier as in this plea aforesaid, for the several purposes in this plea in that behalf aforesaid, and being, at the said several times when, &c., quantities more than sufficient for supplying the said engine in the said second count mentioned with water for the sole purpose of condensing the steam used for working the said last-mentioned engine, drew from and out of the said cut of the plaintiffs in the said second count mentioned, to wit, by and by means of the said sluices and drains in this plea aforesaid, the said last-mentioned quantities of water, to wit, the said 100,000 tons of water, for the said several purposes for which the same were then, to wit, at the said several times when, &c., so necessary and required as in this plea aforesaid; and then, to wit, at the said several times when, &c., in the said second count in that behalf mentioned, used and applied the same for the said several last-mentioned purposes: which are the same several supposed grievances, &c. Verification.

Replication to plea 4. That defendant and all occupiers, &c., have not, nor has each of them, whilst, &c., as of right, &c., for and during the full period of twenty years, &c., had, used, exercised, and actually enjoyed, &c., nor ought *defendant at the times when, &c., of [*295 right to have had, &c., for himself and themselves respectively, whilst occupier and occupiers of the said lands, mill, and steam-engines in that plea aforesaid, the right, privilege, and easement of drawing from time to time, as of right and without interruption, from and out of the said cut in the said second count mentioned, through and by means of the said sluices and drains in the said second count mentioned, and of using and applying, as of right and without interruption, for and to other and different purposes and uses than the purposes and uses of condensing the steam used for working the said engine in the said second count mentioned, to wit, for and to the purposes and uses of supplying the boilers of the said engine in the said second count mentioned

with water, and of generating steam for working the said last-mentioned engine, and of heating the said mill in the said second count mentioned, and of cleansing the said boilers, and of supplying with water the said cistern, such quantities of water as were from time to time necessary and required by the said occupiers for the time being of the said lands, mill, and steam-engine in that plea mentioned, for the said several purposes and uses in that plea in that behalf aforesaid, as and when, &c., in manner and form, &c. Conclusion to the country. Issue thereon.

The issues of fact were tried before Williams, J., at the Liverpool Summer Assizes, 1851. It appeared that defendant was lessee of premises (a) used for the purpose of cotton spinning, and consisting of The 'Old Mill, erected in 1823, and The New Mill, an additional building, *296] erected in 1829. The land on which they *stood extended from the canal to Richard Street, Rochdale: the Old mill abutted on the canal, and the New on Richard Street. They adjoined each other, and communicated by doors. Each mill had its own boilers and its own steam-engine; the Old mill a 30 horse power, the New a 60. Machinery in one was worked by power from the other. Water was drawn from the canal by a drain for the purposes of the Old mill more than twenty years before the commencement of this action; and, when the New mill was built, the canal water was taken for the purposes of that mill also, being carried into it by a prolongation of the drain. The water continued to be thus taken, for the uses of both mills, down to the commencement of this action; the user at the New mill having then continued for only nineteen years and a half. The purposes to which the water was applied were those stated in the plea, except that there was not, as there alleged, any cistern "on the roof" of an engine house, though there were cisterns in and about other parts of the engine house in each mill, drawing their supply of water from the canal in the manner above stated.

It was contended on behalf of the plaintiffs that the Old and New buildings constituted only one mill, and therefore that the prescription, as pleaded, was not made out by the proof; the mill described by the evidence differing in local situation from that described on the record, and having been, in part, erected within twenty years; and that the use of the water for the new part of the mill was not had openly or as of right. And, further, that, the defendants having made it part of their prescription that they should have water for supplying a cistern *297] on the roof of a certain engine house, whereas *no such cistern was proved to exist, the prescription altogether failed.

Williams, J., left it to the jury to say whether the buildings constituted one or two mills; and whether or not the water had been used as of

(a) Described in the lease as "All those two cotton mills or factories called The Old Back Mill and New Front Mill."

right; explaining to them what amounted to such user. The jury found that there was one mill only; and that the water was used as of right. The learned Judge then directed a verdict for the plaintiffs, reserving leave to move that a verdict for the defendant, or a nonsuit, might be entered.

Watson, in Michaelmas term, 1851, obtained a rule nisi accordingly.

Knowles, Tomlinson, and Cowling now showed cause.(a)—The prescription is in respect of defendant's "lands, mill, and steam-engine;" the verdict is that the whole forms one mill; and, upon the evidence, part of that mill has not existed twenty years. The New mill is identified as a part of the establishment in question by the words of the plea "situate," &c., in "Richard Street," upon which place the New mill abuts. If a prescription be pleaded, though a more extensive one than was necessary for the defence, it must be traversed by the plaintiff, and sustained by the defendant, in its whole extent. The law on this subject is fully stated by Maule, J., in *Peter v. Daniel*, 5 Com. B. 568, 577 (E. C. L. R. vol. 57). In *Drewell v. Towler*, 8 B. & Ad. 785 (E. C. L. R. vol. 28), the plaintiff alleged a right, as tenant of a messuage, to the easement of hanging linen to dry on a certain close; the right proved was not general, as pleaded, but only that of hanging out linen of the tenant's own family; and it was held that the claim *failed altogether, because "the right claimed by the plaintiff" was [298 "larger than that proved." By stat. 34 G. 3, c. 78, s. 113,(b) the water which, under that clause, owners of certain lands may draw off for the sole purpose of condensing steam is to be returned into the Rochdale Canal (allowance being made for inevitable waste in condensing); it is there appropriated to the public right of navigation given by sect. 104;(c) and it passes into the canal of the Duke of Bridgewater,(d) in which the public have a paramount interest, as appears by *Rex v. Trafford*, 1 B. & Ad. 874 (E. C. L. R. vol. 20);(e) and the Company are, so far, trustees for the public. The defendant, who seeks to abridge these public rights, was bound to state expressly the grounds of such a claim, and the purposes, beyond that mentioned in the Act, for which he is entitled, by twenty years' prescription, to detain the

(a) Before Lord Campbell, C. J., Wightman and Erle, J. Crompton, J., took no part in the hearing or decision, having been counsel in the cause.

(b) This clause is set out at length in *Rochdale Canal Company v. King*, 14 Q. B. 123, note (a) (E. C. L. R. vol. 68).

(c) Stat. 34 G. 3, c. 78, s. 104, enacts: "That all persons shall have free liberty with horses, cattle, and carriages, to use the private roads and ways, belonging to the said Company of proprietors (except the towing paths), and with boats, barges, and other vessels, to use the said canal and cuts, for the purpose of conveying coals and all other goods and things, and to use the wharfs and quays," &c., "and the said towing-paths," &c., "upon payment of the rates hereinbefore granted, and subject to the rules and regulations which shall be from time to time made by the said Company of proprietors by virtue of the powers herein granted."

(d) See page 312, post.

(e) *Vesire de novo* awarded in Exchequer Chamber; *Trafford v. The King*, 2 Cro. & J. 263,† 5. C. 2 Tyr. 201, 8 Bing. 204 (E. C. L. R. vol. 21).

water: and he cannot make any part of this statement immaterial by prefixing a *videlicet*. The purposes alleged are: 1. To supply and cleanse the boilers of an engine which is supposed to have existed twenty years; the proof is that the water was taken for the boilers of one such engine, but also for those of another engine which has not
 *299] existed twenty years: 2. To heat a certain mill; but *the greater part of that mill, according to the evidence, has been erected only nineteen years: 3. To supply a certain cistern, to wit, a cistern on the roof of a certain engine house; but, supposing a cistern of the kind to have existed twenty years, there is not, according to the proof, any such cistern on the roof of an engine house.

This is not a case in which the allegations of a plea can be separated and the verdict entered distributively according to Reg. Gen. Hil. 4 W. 4, *Pleadings in Particular Actions*, V., 4, 5, 6—5 B. & Ad. x. (E. C. L. R. vol. 27). Those rules apply where the right is distributively alleged, as a right to pass and repass with carriages and cattle, and to pass and repass on foot; or a right to depasture with horses and to depasture with sheep. Here one entire right is alleged, though for several purposes. [Lord CAMPBELL, C. J., mentioned *Ricketts v. Salwey*, 2 B. & Ald. 360.] It would be necessary here to distribute the right, which cannot be done in such a case. In *Higham v. Rabet*, 5 New Ca. 622 (E. C. L. R. vol. 35), the defendant in trespass justified, alleging a general right of way, on foot and with horses and carriages, over plaintiff's close; the right proved was only to cart timber over the close: and the Court of Common Pleas held that the prescription, not being proved as laid, failed altogether, and that the verdict could not be entered distributively. The present case is that of a prescription consisting of a single claim, and laid too extensively: as if a right were alleged in respect of ten houses, and proved in respect of nine only. In *Bower v. Hill*, 2 New Ca. 339 (E. C. L. R. vol. 29), the plaintiff claimed right of way to a watercourse by reason of his possession of a close: the close, which abutted on the watercourse, had been parcel
 *300] of the King's Head Inn and yard, and *the way had, during that time, been used for purposes connected with the occupation of these premises generally; but the plaintiff's close had been severed from the other property; and it was held that he, now holding only part of the premises to which the prescription had attached, could not claim the way "by reason of his possession of a close of land, from the said close to" the watercourse. *Rogers v. Allen*, 1 Camp. 309, 313, is a case of the same class. In such cases, if the party prescribing could succeed, the verdict would be evidence for him, on a subsequent occasion, of more extensive rights than he really had. The claim here could not be apportioned without making a new plea for the defendant. There is not on the record any issue of which part could be found for him. [WIGHTMAN, J.—He alleges a right to take the water, and a taking, for

several purposes : you say, that, if one of those was a purpose for which he could not take it, his plea fails.] If the Old and the New mill have been made one in such a sense that neither can now be distinguished from the other, it may be that the right which existed as to the Old mill ceases altogether, according to the suggestion of this Court in *Allan v. Gomme*, 11 A. & E. 759, 770 (E. C. L. R. vol. 39). It was intimated, in moving for this rule, that the proper course would have been a new assignment : but the plaintiffs do not contend that the defendant used the water for other purposes than those mentioned in the plea ; the charge is that, using it for those purposes, he was not justified in so doing ; and the evidence bears out this.

Watson, Willea, and Spinks, contra.—The prescription *in [301 respect of a mill was supported by the evidence. The defendant had that which completely answered the description of a mill, as given in the plea, for more than twenty years before action brought : and the right in respect of that mill was not lost because he added something to it. No claim appears by the record for anything of which there has not been a twenty years' user : and the real claim on which the defendant stands could not have been otherwise pleaded than it is here. [WIGHTMAN, J.—The jury find that the New and the Old part make one mill.] Unity of ownership is not to be confounded with unity of subject-matter. There is one mill without the New part. If all that is new were burnt, the description in the plea would still be correct. The words "situate" in "Richard Street" do not alter this view of the case : that description is applied to the "land." If the plea does not point out with sufficient particularity the very premises to which the prescription attaches, the defect arises from the manner in which they are described in the second count : "lands," and "a certain mill and a certain steam-engine." The plea could but follow that description. If the count had mentioned two mills or two engines, the defendant might have pleaded accordingly. It is observable that the second count has the words (adopted in the plea) "within the distance of twenty yards from the said cut," which point distinctly to the Old mill. [Lord CAMPBELL, C. J.—It cannot be meant that the whole premises spoken of there are within twenty yards. Surely the mill comes within twenty yards if any part of it does so. Must not all parties here be supposed to use the common language of mankind, and call the whole establishment a mill ? A mill of this kind is a manufactory, which *may consist of old and new parts.] As to the [302 cistern ; there was evidence of a cistern for which the supply of water was wanted, and to which the allegation of the plea would apply, except as to the position : but this, being stated under a videlicet, is not material and may be rejected as surplusage. [Lord CAMPBELL, C. J.—If it would have been material without a videlicet, your videlicet does not make it otherwise.] Supposing it to be material ; still, if the de-

defendant's right to water was (among other purposes) for supplying a cistern on the top of an engine house, and he has made a cistern elsewhere, the prescription is not affected. As is said in *Luttrell's Case*, 4 Rep. 84 b, 87 a: "If a man has estovers either by grant or prescription to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed, and although he builds new chimneys, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys, or in the part newly added; the same law of conduits and waterpipes, and the like." Therefore, in this case, the plaintiffs should have new assigned, that the defendant took the water, not for the cistern mentioned in the plea, but for other cisterns. That not being done, the state of the record and evidence is, *303] that the defendant *justifies in respect of the rights which he had under the old state of things, and sustains that justification; and it does not appear that he insists upon exercising any other rights. The Court, then, will divide the issue upon this plea, as was done in *Knight v. Woore*, 3 New Ca. 3 (E. C. L. R. vol. 32), where the defendant pleaded a right of way to fetch water and goods, and the right was proved as to water but negatived as to goods. The same application of the General Rules, Hil. 4 W. 4, *Pleadings in Particular Actions*, V., (a) was made in *Giles v. Groves*, 12 Q. B. 721 (E. C. L. R. vol. 64), where the plaintiffs claimed right of ferry to and from a place, and proved it only to that place. [WIGHTMAN, J.—There the plaintiffs, by their allegation, which the defendant altogether denied, were entitled to a verdict as to so much of the right as they proved. Here you answer the declaration by alleging that you did the act complained of in exercise of several rights, and as to one, your evidence fails.] If the allegation of right is taken distributively, the defendant may avail himself of the plea of Not Guilty as to the cistern which appears not to exist. [WIGHTMAN, J.—Your fourth plea admits a taking, for several purposes, and, among them, for the use of such a cistern; which is not proved. So much of the declaration, therefore, as applies to that taking is confessed and not answered; and there must be nominal damages at any rate.]

Cur. adv. vult.

Lord CAMPBELL, C. J., in the same term (April 21st), delivered the judgment of the Court.

We are of opinion that on the fourth plea to the second count the *304] verdict ought to be entered for the *defendant, except in as far as the plea alleges that the water taken from the canal without

the authority of the Act of parliament was used for the purpose of supplying with water a cistern on the roof of the engine house.

The jury have found that the water as actually used for twenty years was used as of right. It was used for all the purposes alleged in the plea, except for the cistern; and, if the use had extended to this, we should have thought the verdict on the fourth plea ought to have been entered generally for the defendant. Although the defendant was in the occupation of what has been called the New mill, which had not been erected twenty years before the cause of action accrued, and he had used the water in an engine erected there within twenty years, we think that the defendant sufficiently proves the allegation in his plea, of his possession of a mill and a steam-engine, by his possession of the Old mill and of the steam-engine mentioned in the second count; and that he sufficiently proves the allegation of the use of the water for the first four purposes, by his having used it for those purposes in the Old mill for more than twenty years. If the plaintiffs meant to rely on the unlawful use of the water for the engine erected within twenty years, they ought to have new assigned.

On the part of the plaintiffs it is further contended that, as the defendant failed to prove the use of the water for the purpose of the cistern, the verdict ought to be entered against the defendant on the whole plea, because it is said that the plea is entire. But we think that, according to the authorities which have been referred to, the issue upon the fourth plea may be applied distributively to the alleged purposes for which the water was used during the period of twenty years, *and that, part of the purposes being proved, pro tanto the verdict must be entered for the defendant. But, as he has admitted [*305 that *some* of the water which the plaintiffs alleged and proved he took was taken by him for another purpose than those which he has proved, the verdict will stand for the plaintiffs for nominal damages.

This will still leave the question open, upon a motion for judgment non obstante veredicto, whether the plea be good which alleges a use of the water beyond the purposes mentioned in the Act of Parliament.

Rule accordingly.

The Court, when granting the rule nisi to enter a verdict for the defendant, had reserved leave to the plaintiffs to move, if it should become necessary, for judgment non obstante veredicto; and a rule was now granted, to show cause why such judgment should not be entered as to so much of the issue upon the fourth plea as had been decided in favour of the defendant. On a later day of this term (May 8d),

Watson, Willes, and Spinks showed cause.—The ground of motion is that the defendant by his fourth plea asserts a right in the occupiers of his land and mill to take, not surplus water for condensing, but such quantities of the water, generally, as were necessary and required by the said occupiers for the purposes of their mill, as and when such quan-

ties were so necessary and required; that this right is claimed, under stat. 2 & 3 W. 4, c. 71, s. 2, by prescription, implying a grant; and that the proprietors of the canal could not make such a grant consistently with the statutes from which they derive their *powers. *306] And reliance is placed on stat. 34 G. 3, c. 78, s. 113, (a) and 46 G. 3, c. xx. s. 23, local and personal, public, (b) as showing that the Legislature permitted the withdrawing of water from this navigation for the purpose solely of condensing steam, the water, after such use, to be returned into the canal for the benefit of the navigation. But the Company's power to grant the water is not so limited. They do not hold the canal under a mere trusteeship like that of a public road. They are proprietors of an undertaking, useful to the public, but from which they derive a benefit in the form of tonnage dues which they are empowered to levy. (c) The water is theirs, subject only to the use by others in the particular modes recognised by the Act of parliament. [Lord CAMPBELL, C. J.—Is not the canal made a public highway?] Nothing obliges the Company to keep it up, if it proves unprofitable. As long as they do so, a limited duty arises, which is pointed out by Tindal, C. J., delivering the judgment of the Exchequer Chamber in *The Lancaster Canal Company v. Parnaby*, 11 A. & E. 223, 242 (E. C. L. R. vol. 39): "The Company made the canal for their profit, and opened it to the public upon the payment of tolls to the Company: and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." Subject to that restriction, such a Company may grant the water for any purpose: and the only *307] *question here is whether, at the time of the alleged misfeasance, they could grant it for other purposes than that of condensing. In *Rochdale Canal Company v. King*, 14 Q. B. 122 (E. C. L. R. vol. 68), where rights of this Company with respect to the water were under consideration, it was suggested that the drawing off water as in the present case did not appear to cause any private damage to the Company for which they could bring an action: but this Court held otherwise. Coleridge, J., after commenting upon the words of stat. 34 G. 3, c. 78, s. 113, and stat. 46 G. 3, c. xx., s. 23, said: "The water, then, having been used by the defendants for illegal purposes, the general principle applies, that, although no appreciable damage may be sustained, in the particular instance, by the wrongful act, yet, as the repetition of such an act might be made the foundation of claiming a right to do the act hereafter, a damage in law has already

(a) 14 Q. B. 122 (E. C. L. R. vol. 68), note (a).

(b) 14 Q. B. 124 (E. C. L. R. vol. 68), note (a).

(c) 34 G. 3, c. 78, s. 25.

been sustained, in respect of which an action is maintainable." And Erle, J., said: "Such a Company has all the rights and remedies which an individual owner of private property has, unless the statute contains some provision to take them away. Then the question is, could an individual owner of private property sue under the circumstances? I am clearly of opinion that he could. It is said that the Company could have no property in the water: perhaps not in the identical passing atoms; but they had in the flow, the *flumen aquæ*." The plaintiffs obtained judgment in that case both in this Court and in the Exchequer Chamber; and the grievances being continued, they moved the Court of Chancery for an injunction; and on that occasion^(a) Lord Cranworth, *V. C., thought, with the common law courts, that the plaintiffs had suffered a disturbance of right for which they had a claim to [*308 compensation, subject only to the question, raised before him, whether the claim had not been waived by acquiescence. [ERLE, J.—You argue that the Company, having a right to turn these waters into their canal for the purpose of keeping a flow, may therefore sell them absolutely if they think fit.] Subject to the purposes of navigation, they have a right to take the water and to dispose of it. The right to the water must be in some one; and they have the same property in it as they would have in a stream of natural water under the same circumstances. *Magor v. Chadwick*, 11 A. & E. 571 (E. C. L. R. vol. 39), shows that no distinction can be made. There is nothing in the Company's local Acts inconsistent with such a right. If a railway company found something in the soil over which their line was carried, which might be made profitable to themselves or to grantees without hindering the traffic, they might use or grant it; and this is the same case. It may be argued here, on the authority of *Wood v. Waud*, 3 Exch. 748,† that the use of an artificial stream of water cannot be the subject of such a right as might be matter of grant: but the decision there relates to a water-course which is casual, and which the landowners creating it are not obliged to keep up: the case, therefore, is not in point. [Lord CAMPBELL, C. J.—You claim a right here, without any qualification, to withdraw, for certain purposes other than condensing, such quantities of water as were from time to time necessary.] The Court will not intend, after verdict, that the defendant claimed to withdraw it in such [*309 *quantities as to impede the navigation. A plea of this kind ought to receive a reasonable construction, and such as may, if possible, sustain the allegation of right; *Manning v. Wasdale*, 5 A. & E. 758 (E. C. L. R. vol. 31), *Tyson v. Smith*, in K. B., 6 A. & E. 745 (E. C. L. R. vol. 33).^(b) [Lord CAMPBELL, C. J.—This plea might have been proved by evidence of a taking which would have interfered with the navigation.] Such proof was not necessary. The mere possibility of

(a) *The Rochdale Canal Company v. King*, 2 Sim. N. S. 78.

(b) In Exch. Ch. (judgment affirmed) 9 A. & E. 406 (E. C. L. R. vol. 36).

an abuse does not exclude the supposition of such a grant as is here relied upon. In the *Grand Surrey Canal Company v. Hall*, 1 Man. & G. 392 (E. C. L. R. vol. 39), the proprietors of the canal were directed by statute to make and maintain bridges across the canal for the use of the adjoining landowners; they built a bridge for the use of persons occupying the lands of one Rolls: the question at the trial was, whether or not the bridge had become a highway by dedication; and it was argued that this supposition was rebutted by the Company's Act: but, the Act not expressly prohibiting a dedication, the Court held that it might be inferred from the evidence. Tindal, C. J., said, during the argument: "Why might not this Company dedicate the bridge? They might be answerable over to the proprietors at large, but there is no statute to restrain them." "They might have prevented the public from crossing the bridge; but if they build a bridge and allow persons to use it, why should not the usual consequences follow?" And, in his judgment: "I am not aware that there is anything in the constitution of the Company to prevent them from dedicating a way to the public, *310] as other persons or *corporate bodies may do. They are the masters of their own property; and though they may be answerable to the rest of the proprietors for a failure of duty, I see no reason why the public may not by user gain a right of way against them, as well as against any other individuals."

By the Prescription Act, 2 & 3 W. 4, c. 71, sects. 2 and 5, the general averment, as made in this plea, of an enjoyment as of right during twenty years, is sufficient; and "any proviso, exception, incapacity, disability," &c., showing the enjoyment not to have been of right, must be specially pleaded. In the absence of such plea, if the enjoyment could, under any circumstances, have been rightfully had, the Court will intend it to have been so. If the user might have been legal, or might have been illegal, reference being had to the rights of the public over this canal as a highway, the illegality should have been replied. In a water running over private land, but subject to a public right of navigation, any subtraction of the water for private purposes, even the draught of it for cattle, may be a nuisance to the public; but the fact must be shown in pleading. [Lord CAMPBELL, C. J.—The declaration says, "whereby the plaintiffs lost and were deprived of the said water." Is not that an allegation that the plaintiffs, who are trustees for the public, have suffered in that character?] Those are merely verba sonantia. The plaintiffs would limit the defendant to a user of this water for the purpose of condensing steam: but nothing on the record shows that the right of user for other purposes may not have been granted to a mill-owner on the defendant's land in the time of Richard I. [ERLE, J.—Would not such right be subject to the provisions of *311] stat. 34 G. 3, c. 78?] Suppose *this were the case of a river, running through a populous country, and subject to a public

right of navigation: it cannot be contended that every landowner on the banks, justifying under a prescriptive right to the use of water, must show, in his pleading, that his exercise of the right did not injure the navigation. Reference may be made on the other side to the dictum in Co. Litt. 115 a, that "regularly a man cannot prescribe" "against a statute;" but that does not apply where the claim of right is founded merely upon a twenty years' user since the statute.

Knowles (with whom were *Tomlinson* and *Cwling*), contra.—The claim to withdraw this water for other purposes than that of condensing violates both public and individual rights, conferred by stat. 34 G. 3, c. 78, s. 104.(a) The privileges and duties of the Company with respect to the water were granted by that Act, and further extended and ascertained by stats. 39 & 40 G. 3, c. xxxvi. and 46 G. 3, c. xx. Their situation, under the several statutes, is that of an association upon which powers necessary to their undertaking are conferred, upon certain conditions; and, among these, that they shall keep open a passage for the public on the canal itself and upon the ways and wharfs adjoining, for which passage certain rates are to be paid; and these rates are to be the security for moneys which the Company are authorized to raise by mortgage, annuity, promissory notes, or otherwise.(b) Another condition is that "the waste water of the said Rochdale Canal" * "shall be [*312 at all times conveyed into the Duke of Bridgewater's Canal, or into the Duke's tunnel near Bank Top in Manchester.(c) The unqualified right of disposal claimed on the other side (even if properly pleaded) cannot be maintained consistently with these conditions. (*Knowles* was then stopped by the Court.)

Lord CAMPBELL, C. J.—The rule must be absolute for judgment non obstante veredicto. This Company was established to make a canal for the public benefit, and was invested with certain powers. When the canal was made, all the Queen's subjects were to have the right of using it, paying certain tolls. It became a turnpike road, which could only be kept in repair by maintaining in it the quantity of water necessary for floating barges. And there was a provision that all the surplus water should go into the canal of the Duke of Bridgewater. The Company,

(a) Ante, p. 293, note (b).

(b) Sects. 4, 5, 6 of stat. 39 & 40 G. 3, c. xxxvi. (local and personal, public), were particularly referred to. And see stat. 34 G. 3, c. 78, s. 79.

(c) *Knowles* cited stat. 39 & 40 G. 3, c. xxxvi. s. 40, which enacts: "That all the waste water of the Manchester, Ashton-under-Lyne, and Oldham Canal, except such water as shall necessarily flow over the waste weirs of the said canal, shall be discharged out of the said last-mentioned canal into the said Rochdale Canal at Manchester aforesaid; and that the said waste water so discharged, and the waste water of the said Rochdale Canal, when so united in the said canal, shall be at all times conveyed either into the canal of the Most Noble Francis Duke of Bridgewater, or along the east side of the street called Shooter's Brow, in Manchester aforesaid, into the tunnel of the said Duke near to Bank Top, in Manchester aforesaid, at the expense of the said Company of proprietors of the said Rochdale Canal, and in such manner as may be most convenient to them, but subject nevertheless to the direction and approbation of the said Duke of Bridgewater, his heirs or assigns."

then, were bound to maintain the navigation and to dispose of the surplus water as the statutes directed. Stat. 34 G. 3, c. 78, s. 113, gave a particular privilege to neighbouring landowners, having steam-engines, namely, that they might "draw from the said canal" "such quantities *313] of water as shall be *sufficient to supply the said engine or engines with cold water, for the sole purpose of condensing the steam used for working any such engines;" and even this was subject to the proviso that a quantity of water equal to that taken, with the exception of inevitable waste, should be returned into the canal on each day when the engine was used, "so that no obstruction shall arise therefrom to the said navigation." Subject to this condition every landowner within twenty yards of the canal might take the water for the purpose of condensing only. The present action is brought expressly for violating the condition of the Act in this respect. The declaration refers to the Act of parliament, and alleges that the defendant had a mill and steam-engine upon land within twenty yards of the canal, but that he diverted water from the canal in greater quantity than was necessary for condensing steam, and for other purposes than condensing steam. The defendant pleads a justification to both these breaches, alleging a prescriptive right "of drawing from time to time" "from and out of the said cut," "and of using and applying" "for and to other and different purposes and uses than the purposes and uses of condensing the steam used for working the said engine," to wit, the purposes and uses "of supplying the boilers of the said engine" "with water, and of generating steam for working the said last-mentioned engine, and of heating the said mill" "and of cleansing the said boilers," "such quantities of water as were from time to time necessary and required" by the occupiers of the mill and engine "for the said several purposes and uses," "as and when" they were so required. That is a claim, by supposed grant, to take more water than the Act allows; as *314] much, that is, as may be necessary for *the several purposes stated, and whatever the consequences may be to the navigation. Such a plea, even if confined to the surplus water, would be bad, because the Duke of Bridgewater has a right to that surplus; but it is not so confined. Mr. *Watson* was obliged to contend that the Company might, if they thought proper, stop the navigation altogether, or grant away so much of the water that the use of the canal by boats and barges might be prevented. But it is impossible to say that they have such a power. The water is not the Company's for such purposes. They have a right only to use it; to pass the surplus to the Duke of Bridgewater, and apply to the uses of the canal the water which is requisite for those uses. If they had made a grant of the water in the terms of this plea, such a grant would have been *ultra vires*, and bad; their successors would not have been bound by it; and it could not have been effectually pleaded in bar to the present declaration.

COLERIDGE, J.—I am of the same opinion. The foundation of the fourth plea is a supposed grant, the existence of which is to be shown by acts of user. But, if the acts of user would not be legal, the grant cannot be inferred from them. The Company here are not the owners of the water, but trustees for the public, under a very limited trust. They are bound to apply all the water that may be required to the purposes of the navigation; they are also bound to allow so much as is wanted for the particular use (specified in stat. 34 G. 3, c. 78) of the mill owners within a certain distance of the banks. The Act last cited at the Bar^(a) provides *even for the surplus water; otherwise [*315 there might have been some foundation for an argument with respect to this on the part of the defendant. As the case stands, either the water which has been diverted is within the specified uses, and then no grant could have been made of it, apart from those uses; or, at any rate, it was surplus water which the Company were bound to transmit to the canal of the Duke of Bridgewater, and therefore could not grant. Allusion has been made to some expressions which I am said to have used in *Rochdale Canal Company v. King*, 14 Q. B. 122 (E. C. L. R. vol. 68); but these must be taken with reference to the facts which were then before the Court, and will not affect the decision of this case.

ERLE, J.—This is a claim to impose a servitude upon the canal by virtue of a twenty years' user. The party seeking to establish such a claim must show a grant by a person capable of making the grant relied upon. Now the grant here is by persons having no distinct ownership of the water, but entitled only to the flow of it for the purposes of the navigation, and having no right to the surplus. If it had appeared, by direct evidence, that the Company had made a grant to the purport now supposed, setting out their title, that grant would have appeared to be against the right of the public, and void upon the face of it. The twenty years' user, therefore, could establish no right.^(b)

Rule absolute.

(a) 39 & 40 G. 3, c. xxxvi. s. 46.

(b) Crompton, J., took no part in the decision, having been counsel in the cause.

*316] *SHEPHERD v. HODSMAN. April 17.

Sect. 57 of stat. 3 G. 4, c. 126, provides that "all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees" "letting such tolls," "or by their clerk or treasurer," shall be valid, "notwithstanding the same may not be by deed or under seal."

Held: 1. That an agreement for the letting of tolls signed by the clerk to the trustees, and stating that by the agreement he, "on behalf of the trustees," did "agree to let," and the lessee did agree to take, the tolls and toll-house for two years, was made according to sect. 57; the clerk having authority, by the statute, to contract, as well as to sign on behalf of the trustees. 2. That stat. 3 & 9 Vict. c. 106, s. 3, which provides that "a lease, required by law to be in writing, of any tenements or hereditaments," shall be void at law unless made by deed, does not apply to agreements for the lease of tolls under stat. 3 G. 4, c. 126.

THE declaration, by plaintiff, as clerk to the trustees under "an Act for more effectually repairing and otherwise improving the road from Beverley to Kexby Bridge in the county of York," (a) stated that, at a public meeting of the trustees, at Beverley, the tolls of the Kexby turnpike gate, on the said road, were duly put up to be let to farm, by auction, for two years, to commence from the 1st day of February then next; at which meeting one Robert Norris became and was the last and highest bidder for the said tolls, and was thereupon duly declared the farmer or renter thereof at a certain rent, to wit, &c.; and the said R. N. did then produce and tender one George Grayburn and the defendant to the trustees as his sureties for the payment of the said rent; and thereupon, by a certain agreement in writing, then made between plaintiff, as such clerk as aforesaid, of the one part, and the said R. N., G. G., and defendant, of the other part, "which said agreement was then signed by the plaintiff, as and being such clerk as aforesaid," and by the *317] said R. N., G. G., and defendant, "the plaintiff, on behalf of the said trustees, did agree to let, and did thereby let, and the said R. N. did agree to take, and did thereby take, to farm the said tolls and duties," "together with the toll house and appurtenances," for the term of two years, at the yearly rent as aforesaid. And the said R. N., G. G., and defendant "did, and each and every of them did, thereby agree with the plaintiff, as such clerk as aforesaid," that they or some one of them, their heirs, &c., would pay the said yearly rent during the said term: "and, the said agreement having been so made and signed, the defendant, in consideration of the premises, promised the said trustees" to perform and fulfil the said agreement. Breach, non-payment by Norris of six months' rent, and refusal by defendant to pay the same.

Plea, Non assumpsit. Issue thereon.

On the trial, before Lord Campbell, C. J., at the York Spring Assizes, 1852, it was objected, on behalf of the defendant, that the agreement recited in the declaration was void, inasmuch as, though it recited the putting up to auction and the letting of the tolls as prescribed by stat.

(a) 9 G. 4, c. lxxviii. (local and personal, public).

3 G. 4, c. 126, s. 55, the agreement should have been made by the trustees themselves, sect. 57 authorizing the clerk to sign on their behalf, but not to contract. The Lord Chief Justice overruled the objection, and a verdict was given for the plaintiff, leave being reserved to move to enter a nonsuit.

Watson now moved accordingly.—First, the agreement to let the tolls is not made in the manner prescribed by stat. 3 G. 4, c. 126. Sect. 57 of that statute provides “that all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees or commissioners letting *such tolls, or [*318 any two or more of them, or by their clerk or treasurer, and the lessee or farmer, and his sureties, of such tolls respectively, shall be good, valid, and effectual, to all intents and purposes, notwithstanding the same may not be by deed or under seal.” That clause enables the clerk to sign the agreement on behalf of the trustees or commissioners, but not to agree on their behalf. The trustees or commissioners only can be the parties contracting with the lessee. *Bell v. Nixon*, 9 Bing. 393 (E. C. L. R. vol. 28), and *Lee v. Nixon*, 1 A. & E. 201 (E. C. L. R. vol. 28), show how strictly the provisions of the statute, as regards the form of such agreements, are to be construed. It was held in *Pitman v. Woodbury*, 3 Exch. 4,† that, where a lease is not executed by the lessor, the lessee, although he may have executed, is not bound by the covenants made by him in consideration of the lease. Here the commissioners, who are the real lessors, have not executed: and the action therefore does not lie.

Secondly, such an agreement as this should now be under seal. Stat. 3 G. 4, c. 126, s. 57, declares that it shall be good notwithstanding it may not be under seal: but it has been since enacted by stat. 8 & 9 Vict. c. 106, s. 3, that “a lease, required by law to be in writing, of any tenements or hereditaments,” shall “be void at law, unless made by deed.” [Lord CAMPBELL, C. J.—Stat. 8 & 9 Vict. c. 106 is “An Act to amend the law of real property.” Can the provisions of the Act apply to a lease of turnpike tolls under stat. 3 G. 4, c. 126?] Toll certainly come under the denomination of “hereditaments.” And here the toll house is let, which is real property and a “tenement.”

Lord CAMPBELL, C. J.—I am of opinion that there *should be no rule. A statutory mode has been prescribed for making leases [*319 of this description. The statute authorizes the trustees or commissioners to let the tolls to the highest bidder, under certain conditions, at a public meeting; and declares that the agreement for such letting is to be signed by the trustees or commissioners, or their clerk or treasurer. Here it is signed by the clerk; and the agreement recites the whole of the transaction which took place according to the provisions of sect. 55; and it states that the tolls were taken by *Norris* as lessee, and that the defendant became his surety. I think, therefore, that the agree-

ment is made in perfect compliance with the provisions of sect. 57. As to the objection that such agreements ought now to be under seal, I think it would be strange to hold that the provisions of stat. 8 & 9 Vict. c. 106, which was passed for the purpose of amending the law of real property, were intended to embrace statutory agreements made under stat. 3 G. 4, c. 126. Indeed, if we were to construe the latter statute strictly, we should find that it does not require the lease itself of the tolls to be in writing at all, but only that the agreement for such lease, which operates, of course, as a lease, must be in writing: so that stat. 8 & 9 Vict. c. 106, s. 3, could not apply. It applies, in fact, only to such leases as are required to be in writing by the Statute of Frauds; and not to agreements for leases of tolls under this Act.

WIGHTMAN, J.—I am of opinion, as regards the first objection, that the agreement is in compliance with stat. 3 G. 4, c. 126, s. 57. The trustees are, by sect. 55, to be the parties who actually let the tolls: but the statute does not enact that the contract for letting them must *be made by the trustees in person. Under sect. 57, the clerk
*320] may clearly make the contract on behalf of the trustees. I am further of opinion that stat. 8 & 9 Vict. c. 106, s. 3, does not apply to agreements for the lease of tolls under stat. 3 G. 4, c. 126.

ERLE, J.—It appears to me that the letting of the tolls in this case has been according to the provisions of sect. 55, and that the agreement for such lease has been recorded according to the provisions of sect. 57. Stat. 8 & 9 Vict. c. 106, does not apply to agreements of this kind, which are not leases, although, when reduced into writing, they are to have the effect of leases.

CROMPTON, J.—By the statute, a parol agreement for the lease of tolls, signed by the trustees or their clerk, is to have the effect of an actual lease by the trustees. Stat. 8 & 9 Vict. c. 106, s. 3, has no reference to agreements of this kind. In *Bell v. Nixon*, 9 Bing. 393 (E. C. L. R. vol. 23), it was held that, where two persons acted jointly as clerks to the trustees, the signature of one only was not sufficient; but it was not disputed that they could, jointly, make the agreement on behalf of the trustees. I think the agreement here is made in accordance with the provisions of sect. 57.

Rule refused.

*CHATFIELD v. COX. April 20.

[*321]

Defendant was indebted to plaintiff in 47*l.*; and C. & W. were indebted to defendant in 48*l.* By agreement between C. & W., plaintiff and defendant, the following document was delivered to plaintiff: "To Messrs. C. & W. I request you will supply Mr. C." (plaintiff) "with such parcels of Roman cement as he shall require, to the amount of 48*l.*, and charge to the account standing with you to my credit. R. C." (defendant). Under this was written:

"To Mr. C." (plaintiff). "On the consideration above named we agree to supply to your order, when you shall require it, Roman cement to the amount of 48*l.* C. & W."

Held, that this was an agreement relating to the sale of goods within the exemption in Schedule Part I. to stat. 55 G. 3, c. 184, and therefore did not require a stamp.

ASSUMPSIT on a bill of exchange for 47*l.*, drawn by one Joseph Liddiate on, and accepted by, defendant, and endorsed by the said Joseph Liddiate to plaintiff. There were also counts for interest and on an account stated.

First plea: That, after the making of the said bill, and after the accruing of the causes of action in the said counts mentioned, and before the commencement of this suit, to wit, on, &c., certain persons named Cleaver and Watson were indebted to defendant in the sum of 48*l.* 13*s.* 10*d.*; that it was thereupon agreed between plaintiff, defendant, and the said C. and W., that defendant should relinquish and abandon all claim to, and exonerate and discharge the said C. and W. from the payment to him of the moneys due and owing on the said bill, and from all causes of action in respect thereof; and that the said C. and W. should, on being required by plaintiff, deliver to him such parcels of Roman cement as he should require, to the value of the said sum of 48*l.* 13*s.* 10*d.*, in lieu of paying defendant the said debt due to him from them; and that that debt, and also the debt and causes of action as to the said bill in the first count mentioned, should be taken as satisfied by the said agreement: That the said agreement was so made by defendant and the said C. and W. in satisfaction and *discharge of the said bill and causes of action in the said first count mentioned; and that [*322] plaintiff accepted the said agreement in such satisfaction and discharge. Verification.

Replication, that the said agreement was not made and accepted in satisfaction and discharge of the bill and causes of action in the first count mentioned, *moda et formâ*. Issue thereon.

On the trial, before Lord Campbell, C. J., at the Middlesex sittings after last Hilary Term, the following document was put in by the defendant in support of the first plea.

"8 Wellington Square, Chelsea, December, 1848.

To Messrs. Cleaver and Watson.

Gentlemen, I have to request you will supply Mr. R. Chatfield with such parcels of Roman cement as he shall require to the amount of 48*l.* 13*s.* 10*d.*, and charge to the account standing with you to my credit.

Yours,

ROBERT COX."

Underneath was written:

"Elizabeth Bridge Wharf, Pimlico, December, 1848.

To Mr. R. Chatfield.

On the consideration above named we agree to supply to your order, when you shall require it, Roman cement of the best quality delivered within three miles at 1s. per bushel, to the amount of 48l. 13s. 10d.

CLEAVER and WATSON."

This document was not stamped; and it was objected, on behalf of the plaintiff, that it required a stamp, not being an "agreement made for or relating to, the sale of any goods," within the exemption contained in Schedule, Part I. of stat. 55 G. 3, 184. The Lord Chief *823] Justice *admitted the document; and a verdict was given for the defendant, leave being reserved to move to enter a verdict for the plaintiff.

H. Hawkins now moved accordingly.—This is not an agreement either expressly for, or relating to, the sale of goods. The transaction for which it provides is not a sale at all. [Lord CAMPBELL, C. J.—It is a transfer for a pecuniary consideration, the consideration being the liquidation of the debt due from Cleaver and Watson to the defendant.] That cannot be considered as a sale; there is no bargain between the plaintiff and Cleaver and Watson. [Lord CAMPBELL, C. J.—Suppose Cleaver and Watson had delivered the cement to the defendant himself, in satisfaction of his debt.] That could not be considered as a sale. Supposing the cement to have been delivered under this agreement, and that the defendant had nevertheless sued Cleaver and Watson for their debt to him, they could not have pleaded such delivery by way of set-off for goods sold and delivered. [Lord CAMPBELL, C. J.—A guarantee to pay for goods to be supplied to a third person is an agreement relating to the sale of goods within the exemption of the statute.] That is an actual contract for the sale of goods: here no goods are bought or sold at all. [Lord CAMPBELL, C. J.—But in the case of a guarantee the sale of the goods is not the direct object of the agreement.] It is the primary object; here, if there be any sale at all, it is a secondary object of the agreement, the primary one being the liquidation of Cleaver and Watson's debt to the defendant. In *Tilsley on the Stamp Laws*, p. 48 (2d ed.), it is laid down that, "if the primary object *824] of the writing be the sale of goods, the right to exemption *is not affected by reason of its containing a secondary or collateral matter, but it is otherwise where the proposition is reversed." *Smith v. Cator*, 2 B. & Ald. 778, is an instance of the second of these two propositions. [Lord CAMPBELL, C. J.—There the agreement was between principal and factor, not between vendor and vendee, as here.]

Lord CAMPBELL, C. J.—I am of opinion that this agreement is within the exemption of Schedule Part I. to stat. 55 G. 3, c. 184. It is an agreement relating to the sale of goods. No money was to be actually

paid for the cement supplied; but it was to be delivered for a pecuniary consideration, namely, the liquidation of the debt due from Cleaver and Watson to the defendant. The agreement is, practically, for the sale of goods, just as much as a guarantee for the supply of goods which are to be paid for with money. There can be no doubt that delivery of the cement, under this agreement, might be pleaded by way of set-off for goods sold and delivered, in an action by the defendant against Cleaver and Watson for the amount of their debt to him.

WIGHTMAN, J.—The question whether an agreement of this description requires a stamp must be decided by the terms of the instrument itself. Here the agreement is, on the face of it, clearly an agreement relating to the sale of goods. It would clearly have been good evidence for a plaintiff in an action for goods sold and delivered; and it is therefore good evidence for the defendant here, in support of the first plea.

ERLE, J.—I am of the same opinion. When a debtor *has [*325 goods to sell, and the creditor says, If you will deliver goods for me to the amount of your debt, I relinquish my claim in respect of it, that is an agreement for the sale of goods, and is within the exemption in the Schedule, Part I.

CROMPTON, J., concurred.

Rule refused.

The QUEEN v. The Dock Company at KINGSTON UPON HULL.
April 21.

The Hull Dock Company were proprietors of several docks, made at different times and under successive Acts of parliament. The docks communicated with each other, and with the river Humber, and extended into several parishes. Every vessel paid a single toll, which became due on entry into the docks and was paid then, or on clearance outwards; and she was entitled by such payment to go into any one or more of the docks at the will of her own master, or under the direction of the Company's harbour master, who had certain powers for regulating the position of vessels. All the payments, at whatever dock received, were carried to one general account.

Held that the poor-rate upon so much of the docks as lay in any parish must be assessed, not according to the actual receipts in that parish, but to the proportion which the area of docks within that parish bore to the entire area of the docks. For that, in such a case, an assessment on the acreage principle was unavoidable; though an assessment on the basis of earnings within the parish is preferable where the nature of the case permits it.

On appeal, at the Hull Midsummer Sessions, 1851, against a rate for the relief of the poor, assessed upon the appellants in respect of their docks situate in the parishes of Holy Trinity and St. Mary in the town of Kingston upon Hull, which parishes are united for the relief of the poor (by division into eight wards under a local Act), the Sessions confirmed the rate with costs, subject to the opinion of this Court upon a case, the material parts of which are as follows.

The appellants are the owners and occupiers of the docks and basins after mentioned, situated at the port of Kingston upon Hull, which,

previously to the construction of the oldest of the said docks, was an
 *326] ancient *port formed by the river Hull; a part whereof, adjoining the town of Kingston upon Hull, is known by the name of The Old Harbour. The Old Harbour extends from a place formerly called Sculcote Gote to the mouth of the river, and is vested in the Mayor, aldermen, and burgesses of the borough, who receive considerable dues in respect of vessels using the port.

In 1774, by stat. 14 G. 3, c. 56, s. 17, the appellants were incorporated as The Dock Company at Kingston upon Hull; and, by sect. 15, the Company were empowered to make the dock now called The Old Dock, most of the north part of which is in the parish of Sculcoates, and the south part is in the parishes of Holy Trinity and St. Mary. By sect. 22, the Company were from time to time to repair, maintain, support, and cleanse the said dock and certain other works in the said Act mentioned, and by them to be provided by virtue of the Act. By sect. 25, the said dock and the works connected therewith were vested in the said Company. By sect. 42, in consideration of the great charges, &c., of making the said dock and works and keeping the same in repair, certain rates or duties of tonnage were granted to the said Company for every ship or vessel (the King's ships of war and ships employed in His Majesty's service excepted) coming into or going out of the said harbour, basin, or dock within the port of Kingston upon Hull, or unlading or putting on shore, or lading or taking on board, any of their cargo or any goods, within the said port, for every ton a certain sum of money, varying in amount (as in the said section is mentioned) according to the ports or places therein specified between which and the port of Hull the
 *327] said vessels might come or go or trade; which *rates or duties were vested in the Dock Company. The time at which these rates or duties were directed to be paid is pointed out in the following terms: "and shall be paid at the time of such ship's or vessel's entry inwards, or clearance or discharge outwards, or, in case any ships or vessels shall not enter as aforesaid, then, at any time before such ships or vessels shall proceed from the said port, at the custom house in the said port; so as no ship or vessel shall be subject or liable to the payment of the said rates or duties, or any of them, more than once for the same voyage, both out and home, notwithstanding such ship or vessel may go out and return with a loading of goods or merchandise." (The case then referred to sects. 46—52, as to measurement of ships and collection of duties, and sect. 53, as to annual meetings of the Company and accounts to be rendered there, &c.) By sects. 67 to 70 the Guild of the Trinity House of Kingston upon Hull are empowered to appoint a dock master and assistants, with power to direct the mooring or removing of vessels.

The dock now called the Old Dock, with the quays and works men-

tioned in this Act, was constructed (a) within the statutory time. The entrance into this dock from the Old Harbour was through its basin, situate in one of the respondent parishes. The liability of the appellants to be rated in the parish of Sculcoates for so much of the said dock as lies in that parish was established in the Court of King's Bench in 1786. (b)

Stat. 42 G. 3, c. xci., local and personal, public (passed in 1802), for making additional basins or docks at Kingston upon Hull, recites (sect. 1) the before-mentioned *Act and its provisions generally; and it authorizes and requires the said Dock Company to make The [328 Humber Dock and basin. And by sect. 2 it is enacted: "That the said recited Act, and all and every the rates and duties, powers, authorities, provisions, regulations, clauses, penalties, forfeitures, matters, and things, therein and thereby given, granted, vested, levied, or to be executed" (except so far as they are altered, &c., by this Act) "shall be and they are hereby declared to be in full force, as well in regard to the said additional basin or dock, and other works hereby directed or intended to be made, and for effecting all the other purposes of this present Act, as for the purposes of the said recited Act," as fully as if here re-enacted. By sect. 37 the Dock Company are to support and cleanse the Humber Dock. Sect. 58 gives power to purchase land for a third dock, to meet the probable wants of the port.

In 1805, by stat. 45 G. 3, c. xlii., local and personal, public, which was an Act to authorize the raising of money for carrying into execution the powers of the last-mentioned Act, the docks and basins by the last-mentioned Act (42 G. 3, c. xci.) directed to be made were, by sect. 12, declared to have extended to them the same rights and privileges which then belonged to the port of Kingston upon Hull; and they were to all intents and purposes to be deemed part of the said port. And it was declared that all vessels entering into or loading or unloading in the said docks or basins, and all goods, merchandise, and other things which should be loaded or unloaded in or pass through the same, should be subject to the several regulations, and be liable to the several duties, to which they were or had been subject and liable in the port of Kingston upon Hull.

*After this statute was passed, the Humber Dock and basin, [329 and (after an interval of about twenty years) the Junction Dock, were completed according to the provisions of the two last-recited Acts.

In 1844, stat. 7 & 8 Vict. c. ciii. was passed, which, after reciting stats. 14 G. 3, c. 56, 42 G. 3, c. xci., and 45 G. 3, c. xlii., and that it would be expedient that the said Company should be authorized to make certain additional docks, enacted (sect. 1) "that the said recited Acts, and all and every the provisions, rates, matters, and things"

(a) Reference was made here and in other parts of the case to a plan.

(b) *Rex v. The Dock Company of Hull*, 1 T. R. 219.

"therein respectively contained" (except as varied, &c., by any of the said Acts or that Act), shall "be in full force and effect as well in regard to the present docks as the said intended new docks and quays, and all other the works to be made by virtue of and under this Act, and shall extend to this Act, and shall be in force with respect to this Act as effectually" as if herein re-enacted, and the recited Acts and this Act shall be construed together as one Act. By sect. 8 the Company were empowered to borrow money on mortgage of the rates and duties under the said recited Acts and this Act, or by bond. (The case then referred to sects. 66 and 67, which relate to the keeping of accounts of moneys received or expended on account of the Company by the Company or directors, and making and depositing copies of such accounts, as settled and allowed at the annual meeting of the Company in each year.)

By sect. 166 it was made lawful for the Company to construct a new dock on the eastern side of the Citadel at Kingston upon Hull, and also a branch dock at the western side of the Humber Dock and to the north of the railway terminus. By sect. 191 it was declared that these *330] docks and the works respectively connected *therewith should be deemed to be in and within and be port of the port of Kingston upon Hull. By sect. 194 it is enacted: "That no vessel passing up or down the river Humber, without entering any of the docks, basins, or harbour, or not commencing or terminating her voyage at the port of Hull, shall be subject to the tonnage rates imposed by the said recited Acts or any of them, unless such vessel shall load or discharge any part of her cargo within that part of the river Humber which is within the port of Hull, and in that event such tonnage rates shall be payable and paid only in respect of the quantity of goods so loaded or discharged by such vessel." By sect. 195: "No vessel passing up or down the river Hull to or from any place above the Beer houses there, without entering any of the docks or basins, shall be subject to the same tonnage rates, unless such vessel shall load or discharge any part of her cargo within the Old Harbour, or within that part of the river Humber which is within the port of Hull, and in that event such tonnage rates shall be payable and paid only in respect of the quantity of goods so loaded or discharged by such vessel." By sect. 200: "If any vessel using the docks, whether the same shall have previously paid or been liable to tonnage rates or not, shall remain in the docks or any of them for a longer space of time than ten months, to be computed from the time of going into the dock or docks, there shall be paid and payable to the Company by the master or owner of every such vessel, according to the tonnage or burthen thereof, a further rate of one halfpenny per ton for every week during which any such vessel shall remain in the said dock or docks beyond the said period of ten months, in addition to the rates or duties of tonnage payable by virtue of the said recited

Acts." By *sect. 202: "The several rates authorized to be taken by the recited Acts and this Act shall at all times be [*331 charged equally and after the same rate in respect of the same description of vessel and same description of goods upon the same voyage; Provided always, that a vessel proceeding from the said port of Hull to any other port or place and returning from such port or place to Hull, and a vessel first proceeding from any other port or place to Hull and returning to such other port or place shall be considered as performing the same voyage." By sect. 232 a Dock and haven master is to be appointed by the Guild of the Trinity House in Kingston upon Hull, with proper assistants. By sect. 237, the Dock and haven master and his assistants have power to regulate the position, mooring, unmooring, berthing, placing, or removing within the said haven and docks, or any of them, of any vessels entering into, lying in, or going out of, the same respectively, subject to any by-laws, to be made by certain Commissioners named in the said Act. And, by sect. 238, "whenever the despatch of business shall be obstructed by reason of any vessel lying in the said docks, whether the cargo of any such vessel shall or shall not have been discharged, it shall be lawful for the Dock and haven master" (subject to any such by-laws) "to remove any such vessel from any one of the said docks into any other of the said docks into which the vessel can be removed without being taken into the river Humber." By sect. 250, vessels, after being discharged of their cargoes, are to be removed into such part of the docks as shall be set apart for light vessels.

Under the powers and provisions of this Act a branch dock, the dock now called The Railway Dock, has been completed at the western side of the Humber Dock and *to the north of the railway terminus, [*332 and was opened on 4th December, 1846: and the dock on the eastern side of the citadel, now called The Victoria Dock, with its basin communicating directly with the Humber, has also been completed; and the same was opened on 3d July, 1850.

All the docks on the west side of the river Hull communicate with each other, and also with the river Humber to the south through the Humber Dock basin, and with the river Hull or Old Harbour to the east through the Old Dock basin. The Victoria Dock, which is on the east side of the river Hull, communicates through its basin with the river Humber to the south; and it is also intended, and by the last recited Act required, to communicate with the river Hull or Old Harbour to the west by means of a cut or communication, which is not yet completed, but which is in the course of construction, and is expected to be completed in about a year. Upon the completion of that cut or communication, vessels entering the Victoria Dock basin from the Humber will be able to pass through and use all the docks, and to return into the Humber by the Humber Dock basin, or vice versa. At

present vessels entering the Humber Dock basin from the Humber can pass through all the docks except the Victoria Dock, into the river Hull, and through that river into the Humber, or vice versâ.

The Dock Company maintain and repair all their docks and works and in making such repairs their workmen are employed, and their materials, of which they have always a large stock in their yards of works, are used therein indiscriminately. No separate or distinct accounts are kept for the several docks, the whole of the expenditure in maintaining *333] and keeping them in repair *being carried to one general account, although, so far as the Victoria Dock is concerned, its complete construction at the time of its opening in July, 1850, rendered repairs unnecessary at the time of laying the rate now appealed against. There is only one set of officers to superintend the entire establishment of the docks (with the exception of inferior officers and servants for each separate dock); and the duties of the Dock master extend equally over all the docks; but his assistants are assigned to separate docks. There are no distinct or separate rates or duties of tonnage payable to the Company for the use of any particular dock or docks, or of the Old Harbour, nor any accumulative rates or duties for the use of all or any number of them; but the same rates and duties of tonnage both in description and amount are payable, into whatever dock vessels may go, and whether they use only one dock or use more of or all the docks, and whether they use the Old Harbour or not. By the above-mentioned statutes such duties attach and are payable as soon as the vessels enter any of the docks or Old Harbour. It is frequently the case that vessels on the same voyage use two or more of the docks; but whatever number of docks they use they pay only one rate or duty. No additional charge can be made for a vessel taking on board her cargo on her voyage outwards in the said docks or Old Harbour, or any of them, and discharging her cargo on her voyage inwards in the same or the other docks and Old Harbour, or any of them, or vice versâ; but the Company can claim the duties or rates on the vessels at the time of leaving the Old Harbour or any dock on her voyage outwards, or upon her return home afterwards into the Old Harbour or any one of *334] the docks in which she may enter. (Two *instances were then given of vessels having discharged and taken in cargoes, partly in the Humber Dock and partly in the Victoria Dock, and paid only one set of tonnage dues: and it was added that a list was put in evidence by the respondents wherein forty-one vessels appeared to have used both the Eastern and the Western Docks with or without the Old Harbour in a similar manner on the same voyage.) In thus using several docks on the same voyage, the shipowners are governed entirely by their own convenience as to which they will use first: first using sometimes the Eastern Docks, sometimes the Western, sometimes the Old Harbour. Tonnage dues are received for vessels using the Old Harbour only: and,

since the decision of this Court, in *Regina v. The Dock Company of Hull*, 7 Q. B. 2 (E. C. L. R. vol. 58), that the Dock Company are only rateable to the relief of the poor for the dues paid by vessels which come into and use any of their docks, and not for the dues paid to them by vessels which enter the port or use the Old Harbour but do not enter or use any of the docks, a separate account of the dues paid by the latter description of vessels has been kept. A separate account could be kept of the vessels using the Victoria Dock alone, or of vessels which leave that dock, or which enter it, with goods laden (when the dues would first attach). No account is kept of the amount of dues received from vessels using more than one dock, or which use the Old Harbour conjointly with any one or more of the docks. The same rates attach whether the vessels use one or more of the docks; and can be claimed as soon as they enter any of the docks. The further tonnage dues, payable for vessels remaining more than *ten months in the docks, have always been payable generally and without re- [*335
gard to the question whether such vessels within that period have remained within one particular dock or set of docks. (An instance was here given.) But, by the above-mentioned statute, 7 & 8 Vict. c. ciii., s. 200, these further tonnage rates are charged at the rate of one half-penny per ton per week for every week during which any such vessels shall remain in the said dock or docks beyond the period of ten months.

It was admitted by the appellants that the sum of 525*l.* was to be taken as the amount of tonnage dues received by the appellants in respect of vessels which had used the Victoria Dock and basin alone from the opening of their dock in July, 1850, to the end of that year without having entered or come upon the soil of any of the appellants' other docks or works, or of the Old Harbour. And it was proved that that sum was the amount of dues chargeable upon vessels which had used that dock only during the time just mentioned. It was also proved that the amount of dues received for vessels which have used the Victoria Dock and some of the other docks is greater than the amount of dues received for vessels which have used the Victoria Dock alone exclusive of the harbour. It was further admitted that the area of the docks and their respective basins situated within the parishes of Holy Trinity and St. Mary, consisting of the greater part of the Old Dock and all its basin, the whole of the Junction Dock, the Railway Dock, and the Humber Dock and basin, contained 4839 perches: That the area of the Old Dock within the parish of Sculcoates, contains 612 perches: and that the area of the Victoria Dock and its basin, within the parish of Drypool, *contains 724 perches, and, within the place alleged [*336
by the appellants to be extra-parochial, and called the Garrison side, 1769 perches.

The net rateable value on which the appellants were rated in the rate appealed against had been fixed as follows. From the gross receipts of

the appellants in respect of all their tonnage dues, according to their own return, for the use of all or any of their docks or the Old Harbour, were deducted, first the proper deductions usual in such cases, and then the amount of tonnage dues received in respect of vessels using the Old Harbour only. The balance, after making these deductions, was then divided into two parts, in the proportion which the area of the docks and basins situate within the parishes of Holy Trinity and St. Mary bears to the area of that part of the Old Dock which is situate within the parish of Sculcoates; and from the amount of this proportionate sum, in respect of the area of land in the parishes of Holy Trinity and St. Mary, the sum of 525*l.* was deducted for tonnage dues in the Victoria Dock only. The appellants were assessed in the rate appealed against upon the balance thus ascertained.

For about twenty years before the construction of the Victoria Dock and the railway dock, under the recited Act 7 & 8 Vict. c. ciii., the rateable value of the appellants' docks and basins was apportioned between the respondent parishes and the parish of Sculcoates in proportion to the areas occupied in each by the docks and basins situate therein respectively; but on the hearing of this appeal it did not appear in evidence upon what ground this arrangement for apportionment had been made.

*337] *The appellants contended that the entire rateable value of all their docks and basins, including the Victoria Dock and basin, ought to be taken jointly and then apportioned among the several parishes and places within which the same docks and basins are respectively situated, in proportion to the areas of such docks and basins respectively within such parishes and places. The respondents contended that both the rateable value and the area of the Victoria Dock and basin ought to be excluded in calculating and apportioning the rateable value of the docks and basins situated within the parishes of Holy Trinity and St. Mary. It was agreed that no other objection or question, whether of form or substance, should be raised by either side in the said appeal.

The Court held that the principle contended for by the respondents was right.

If this Court should be of opinion that the principle of rating contended for by the respondents was wrong, the order of Sessions and the rates were to be amended as follows, &c. (The case then gave reduced estimates of rate for the South Myton ward, North ward, St. Mary's ward, Whitefriar ward, and North Myton assessments respectively.) Otherwise, the order of Sessions and the rate were to be confirmed.

Watson and *Archbold*, in support of the order of Sessions.—The question is, whether the Court should look at the whole receipts and whole acreage, and consider the Company rateable for their docks in Holy Trinity and St. Mary in the proportion which the area in those

parishes may bear to the entire area of the docks; or whether the rate should be imposed, *in each parochial district, according to the profits accruing there. The latter is the true principle. The [*838 Company must be rated in respect of their occupation of land and the profits arising from that occupation, in the rating parishes. [ERLE, J.—The cardinal fact in the case is, that a vessel, though using all the docks, pays only one toll.] At whatever dock a vessel enters and pays toll, the toll is paid for using so much of the docks as the vessel may actually make use of; and the toll is earned by that portion of the docks, in whichever parish situate, which is so used. The appellants contend that a ship coming into the Drypool Dock, for instance, and paying there, obtains right of access, not to that dock only, but to others, where she enjoys the right in common with other ships which have paid elsewhere, and may in like manner come into the Drypool Dock, but perhaps never do: and it is argued that, as the payment of toll makes each ship free of all the docks, no ship pays, specifically, for the use of any particular dock which she happens to enter. But, as was said by Lord Denman, delivering the judgment of the Court in *Regina v. Hull Dock Company*, 7 Q. B. 2, 25 (E. C. L. R. vol. 53): “The ship which actually comes into and uses the docks is not the less benefited by them because the toll must have been paid even if it had not come in; and the benefit conferred by the use of the dock is not the less the meritorious cause of the toll because other ships pay, to which that meritorious cause does not apply. To those which come into the docks the benefit is conferred by the docks and in the docks; and therefore the toll paid for that benefit must be held to be earned there in the docks, and to be profits arising *there.” So, here, the toll is earned by the dock into [*839 which the ship comes, though the ship might have had the benefit of that toll without entering the particular dock. Suppose the Company had docks at Hull and London, and the receipts went into one common fund, and the general management were vested in one set of officers: it would not follow that the docks at the two places could be rated according to acreage. [Lord CAMPBELL, C. J.—If the Company had docks in the Humber and Tyne, and took one toll for the use of both, would not each dock be the meritorious cause? And why might not the acreage principle then apply? As to the payment, does it make any difference in such a case whether the dues are paid after use of the two docks, or prospectively, and when both may perhaps not be used? The case describes several docks as distinct from each other: but, if, instead of being called separate docks, the whole had been called one dock, would the facts have stood otherwise than as they now do? WIGHTMAN, J.—Is not this, in effect, one dock running into different parishes?] There are several distinct docks, under different Acts of Parliament. As to any one, the question, under the Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 1, is, what is “the net annual value”

of that dock in the rating parish. It is, the sum paid by the ships entering or leaving the docks for the right to use that dock within the parish. The series of docks here may be compared to a canal running through several parishes and earning tolls which are carried to a common fund: in that case, a vessel goes from one end to the other and pays accordingly; the rate is apportioned according to the amount *340] actually *earned in each parish, and not by acreage. If the vessel does not pass along the whole line, the rate, so far as the earnings from that vessel are concerned, will be in proportion to the extent actually passed over; *Rex v. Kingswinford*, 7 B. & C. 236 (E. C. L. R. vol. 14). As was said by Bayley, J., there: "If the profit arising from a given quantity of land vary in different parishes, the rate must vary in the same proportion." The rule acted upon in that case is supported by *Rex v. Woking*, 4 A. & E. 40 (E. C. L. R. vol. 31), and *Regina v. London and South-Western Railway Company*, 1 Q. B. 558 (E. C. L. R. vol. 41). [Lord CAMPBELL, C. J.—The Court has adopted the parochial earnings principle, wherever it could be applied. ERLE, J.—In the case of a canal, persons do not pay for the whole if they only use part. Lord CAMPBELL, C. J.—Here the benefit paid for is not obtained unless the vessel can use the whole of the docks. It is contemplated that she may want to go from one to another, picking up her cargo.] Suppose the Company had let the Victoria Dock, the principle contended for by the respondents is the only one which could have been applied in rating the lessee. That principle is supported by *Regina v. The Cambridge Gas Light Company*, 8 A. & E. 73 (E. C. L. R. vol. 35), and by *Regina v. London, Brighton and South Coast Railway Company*, 15 Q. B. 313 (E. C. L. R. vol. 69), where many of the cases are reviewed. [Lord CAMPBELL, C. J.—In the case of the railway, if you pay from London to Croydon, that does not entitle you to go to Brighton; therefore the line from London to Brighton is not the meritorious cause of earnings: here the vessel, having once paid, may go to any *341] dock, or be removed to *any at the will of the Dock master. ERLE, J.—There is a potential use of the docks, which becomes an actual use upon entry.] Still, the question is, in what parish? The tolls are paid for the use of the Company's land laid out in docks. That land has been made very valuable in one parochial district, and much less so in others; the appellants seek to give an unfair relief to the former district by clubbing together the areas and values in all the districts.

R. Hall, with whom was *T. C. Foster*, contra, was stopped by the Court.

Lord CAMPBELL, C. J.—The appellants are entitled to our judgment. The decisions in *Rex v. The Dock Company of Hull*, 1 T. R. 219, and *Regina v. Hull Dock Company*, 7 Q. B. 2 (E. C. L. R. vol. 53), in which cases the question was merely rateability or non-rateability, do not

assist us here. This Court has adopted the parochial earnings principle of rating wherever it was practicable; but we cannot do so where the whole subject of rate is one concern, and part of the land which makes the entire profits is in one parish and part in another. In such a case no principle can be adopted but that of acreage; we must see what proportion of the land lies in each parish, and allow the rate accordingly. Here we have one concern, constituting one source of profit: the toll is taken for the use of land in two parishes: it is received only in one; but the land in the other is the meritorious cause just as much as the land where the receipt is. The case of a railroad is quite different: *there the payment is made, not for using the whole line, but a [342 section: the traveller cannot, for the money paid, go beyond a given point: but in this case the ship, having once paid, may go to any of the docks. All, therefore, are the meritorious cause of profit, and the only principle of assessment is to ascertain how much of the entire area lies in each of the parishes.

WIGHTMAN, J.—The Court would here, as in other cases, adopt the parochial earnings principle if it could be applied: but it cannot. These docks are a system of compartments carried through several parishes: but they are virtually one dock, although so divided; and the payment is made for using that one dock, into whatever parishes it may extend. The case is just the same as if a single undivided dock lay in several parishes; and in such a case the acreage principle must unavoidably be adopted.

ERLE, J.—These docks form one entire rateable subject-matter; the profits accruing equally from the whole. The actual use of all or any depends merely upon the convenience of the party paying toll, or the will of the Dock master. Then the rate in each parish must be proportioned to that part of the entire area which is contained in each parish. In the case of the Hammersmith Bridge^(a) the bridge lay in two parishes; the toll was received in one only: but the valuable occupation was an entire subject of assessment, which, the Court said, was to be apportioned between the two parishes. The rate must be amended.

*CROMPTON, J.—I am of the same opinion. The toll is paid on entering any one dock, not for entering that dock, but for the [343 privilege of using the whole system of docks. The acreage principle, therefore, is the only one applicable.

Order and rate to be amended.^(b)

(a) *Rex v. Barnes*, 1 E. & Ad. 113 (E. C. L. R. vol. 29). See *Regina v. Hammersmith Bridge Company*, 15 Q. B. 369 (E. C. L. R. vol. 69).

(b) See *Regina v. North and South Shields Ferry Company*, 1 E. & B. 140 (E. C. L. R. vol. 72).

The QUEEN v. The LEEDS and BRADFORD Railway Company.
April 21.

Stat. 11 & 12 Vict. c. 43 (for regulation of proceedings before justices out of Sessions), enacts by sect. 11, that, where a complaint shall be laid before a justice, on which he shall have authority to grant an order, such complaint shall be made within six calendar months from the time when the matter of complaint arose. By sect. 38, the Act is to commence and take effect seven weeks after its passing.

Held that a complaint, after the Act came into operation, upon matter which arose before, was barred by sect. 11, though six calendar months from the time when the matter of complaint arose had elapsed when the statute passed:

For, the Act having given time for preferring any such complaint before the limitation clause came into operation, no such injustice resulted from giving full effect to sect. 11 as would warrant the Court in putting upon it a restricted construction.

A CERTIORARI having issued in pursuance of the rule granted by the Court in this case (Re Edmundson, 17 Q. B. 67), *R. Hall*, in last Hilary term, obtained a rule to show cause why the order, removed under the writ, should not be quashed.

The order bore date 16th September, 1850, and recited a complaint made on the 13th of that month, of acts done in 1846 and 1847. It was agreed, in argument upon the present rule, that the cause of complaint in fact arose more than six calendar months before the passing of stat. 11 & 12 Vict. c. 43, "to facilitate the performance of the duties of justices of the peace out of Sessions," &c.

*344] *Joseph Addison* now showed cause.—The Court decided, in Re Edmundson, 17 Q. B. 67 (E. C. L. R. vol. 79), that this was a case in which, according to stat. 11 & 12 Vict. c. 43, s. 11, the complaint ought to have been made "within six calendar months from the time when the matter of such complaint" "arose." But it was not brought to the notice of the Court that, in the present instance, six calendar months from the time when the matter of complaint arose had elapsed when the statute passed. The case, therefore, was not one upon which the statute could take effect: for, if it did, it must relate back to the expiration of the six months. But, in *Gillmore v. Executor of Shooter*, 2 Mod. 310, (a) a case on the Statute of Frauds, the Court would not allow "that the Act had a retrospect to take away an action to which the plaintiff was then entitled." *Ashburnham v. Bradshaw*, 2 Atk. 36, was a like decision, in principle, on the Mortmain Act, 9 G. 2, c. 36. The authorities applicable to this point were much discussed in *Moon v. Durden*, 2 Exch. 22, † where the general doctrine that statutes should be construed prospectively, not retrospectively, was recognised by the whole Court of Exchequer, and applied by the majority to the case then before them. If this Act had been intended to operate retrospectively, there would have been some express provision enabling parties to institute proceedings within a given time, so as to escape the limitation. Here the enactment of sect. 11 is peremptory, that "such

complaint shall be made and such information shall be laid within six calendar months," &c.: no interval is specified in which proceedings may still be *taken. (*Addison* then proceeded to argue other [*345 points of the case.) [Lord CAMPBELL, C. J.—We are most alarmed by the objection on sect. 11 of the statute. *WIGHTMAN, J.—Towler v. Chatterton*, 6 Bing. 258 (E. C. L. R. vol. 19), is an authority against you; there *Gillmore v. Executor of Shooter* was cited (from T. Jones's Reports) against the limitation; but the Court held it distinguishable, "because the statute now under review" (9 G. 4, c. 14) "prevents all the mischief which the Judges in the case in Jones contemplated, by giving due notice that this law should have no operation till the 1st of January, nearly eight months after its enactment." Lord CAMPBELL, C. J.—Stat. 11 & 12 Vict. c. 43, gave more than six weeks; for it passed on 14th August, 1848, and, by sect. 38, was to "commence and take effect from" 2d October in that year.] In *Towler v. Chatterton* the words of the Act were perhaps thought too strong to allow any latitude of interpretation; and some doubt is thrown upon the authority of the case by the judgment of Rolfe, B., in *Moon v. Durden*.

R. Hall, contrà.—It is not probable that the Legislature meant the limitation to be inoperative in every case of complaint originating before the statute: but the argument on the other side would render it so. By sect. 38, ample time was given for making good any complaint prior to the passing of the Act: and the intention was that, after 2d October, 1848, the whole Act should apply to all cases. The first provision of sect. 1 applies in terms to "all cases where an information shall be laid," &c.; and the language of the Act is equally general down to sect. 11. *Moon v. Durden*, 2 Exch. 22,† was a *very [*346 different case from this; the attempt there, under stat. 8 & 9 Vict. c. 109, s. 18, was to invalidate contracts which were complete, and valid in law, when the Act passed. (He was then stopped by the Court.)

Lord CAMPBELL, C. J.—I am sorry that the objection founded on stat. 11 & 12 Vict. c. 43, s. 11, must prevail: probably the others might have been answered; but it is impossible to get over this. Sect. 1 lays down rules for "all cases where a complaint shall be made," upon which justices "have or shall have authority" to make any order. The sections which follow, regulating the practice, down to sect. 10, are in continuation of sect. 1, and equally general: then sect. 11 limits the time within which, in all cases (not otherwise expressly provided for), such complaint shall be made. If the matter of complaint here had arisen after the passing of the Act, there could be no doubt: then, the matter having arisen before, is the limitation clause retrospective? If it had been enacted that the provisions of the statute should come into operation immediately, I should have said that there was a hard-

ship in their being construed retrospectively, and I should not have been willing so to construe them. But, here, the Act receiving the Royal Assent on 14th August, sect. 38 directs that it "shall commence and take effect from the 2d day of October in the year of our Lord 1848." That seems to be an intimation by the Legislature that they mean to give a time, whether long or short, within which bygone matters of complaint may be brought before justices, and the limitation avoided. Six or seven weeks are given: if the interval had been as many months, the case would be the same. We *347] cannot apply any measure *which would enable us to say whether six months or six weeks would be the proper time. A time is given. *Towler v. Chatterton*, 6 Bing. 258 (E. C. L. R. vol. 19), is strongly in point: but, even without such an authority, we must give effect to the intention of the Legislature as shown by these clauses.

WIGHTMAN, J.—If sect. 11 had stood alone, there would have been great room for contending, on the ground of hardship, that the limitation clause could not apply to this case, where the six months had already elapsed when the statute passed. But that reasoning fails when it is seen that the Legislature has expressly provided a reasonable time for proceeding upon any existing matter of complaint before the limiting clause can take effect. The case, therefore, falls within the reasoning of the Court of Common Pleas in *Towler v. Chatterton* upon stat. 9 G. 4, c. 14; and the proceeding is barred.

ERLE, J., concurred.

CROMPTON, J.—I am of the same opinion. Sect. 11 enacts that all complaints there mentioned shall be made within six calendar months from the time when the matter of complaint arose. If that could not have been done in the particular case, I should have thought that the section could not apply. But, here, all the words of enactment on the subject might be carried out without unjustly excluding any remedy for existing complaints. The enactments of sect. 1 are worded generally, *348] so as to *operate retrospectively as well as prospectively; and all the following sections (except sect. 5, which seems limited to future subjects of complaint) are equally general. The rule must therefore be absolute.

Rule absolute.

The QUEEN v. Sir THOMAS MARYON WILSON, Baronet, and JOHN SUTTON, Esquire, two of the Justices of KENT. April 21.

When a road has been dedicated to the public by a landowner, but the conditions have not yet been fulfilled which make it repairable by the parish under stat. 5 & 6 W. 4, c. 50, s. 23, the landowner is not liable to repair it: and, consequently, he is not the "person having the management" of such road within the Railways Clauses Consolidation Act, 1845 (9 & 10 Vict. c. 20), s. 57: although, since the dedication, he has voluntarily done some repairs, made a sewer and drains, and granted permission to persons desiring to open communications with the sewers, or interfere with the road; and no one else has, in these respects or any other, managed or exercised control over the road or sewers.

Such dedicator cannot, therefore, recover penalties, under sect. 57 of the Railways Clauses Act, against a Railway Company who have made a cut across such road, rendering it impassable, and have not in due time restored the communication.

Quære whether the Company could be indicted for the obstruction of such a way by severing and not restoring it.

MANDAMUS. The writ, addressed to the above named justices, recited:

That information and complaint was, on 12th May, 1851, laid before you the said justices, that The South Eastern Railway Company, in the exercise of the powers granted them by an Act of parliament made, &c. (9 & 10 Vict. c. cccv., local and personal, public), "To enable The South Eastern Railway Company to make a railway from the London and Greenwich Railway to Woolwich and Gravesend," incorporating therewith the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), had found it necessary, and that it had been found necessary, to cross and cut through a certain public *carriage road, situate and being in the parish of Plumstead in the said county of [349 Kent, that is to say, a certain public carriage road called and known as "The Plumstead Villas Road," the whole of which road was and is situated within the said parish of Plumstead and county of Kent, so as to render the said road impassable for passengers and carriages, and that accordingly the said Company, in the exercise of the said powers, did, on 23d December, 1848, cross and cut through the said road so as to render it impassable for passengers and carriages, by means of a certain trench or cutting of 20 feet deep and 65 feet wide, made by the said Company; and also that the first operation on the said road, whereby the same was crossed and cut through as aforesaid, was commenced between the 1st September, 1848, and 31st December in the same year, to wit, on the 11th September in the last-mentioned year: and also that the said road, so crossed, cut through, and interfered with as aforesaid, could and might have been, and then could and might be, restored compatibly with the formation and use of the said railway; and that more than twelve calendar months had then elapsed since the first operation on the said road so commenced as aforesaid: and also that Lewis Davis, of, &c., surveyor and land agent, alone, from the first formation of the said road to the time of the laying of the said informa-

tion and complaint, had always had, and then had, the management thereof; and that he had not by writing under his hand consented to an extension of the period allowed by law to the said Company for restoring the said road; and also that the said road was not restored by the said Company or any other persons or person on or during the *350] 26th day of October, 1850; which last-mentioned day *elapsed after the expiration of the said period of twelve calendar months since the said first operation on the said road as aforesaid: but the said road then during the said last-mentioned day remained and was wholly unrestored in any manner whatsoever, contrary to the form of the said statute in such case made and provided: Whereby, and by force of such last-mentioned statute, the said South Eastern Railway Company had forfeited to the said Lewis Davis the sum of 5*l.* for the said last-mentioned day during which the said road was not restored as aforesaid. And thereupon the said L. D. prayed that the said Company might be summoned to answer the premises. The writ then recited that the justices accordingly issued their summons to the Company to appear, on, &c., at the public rooms, &c., before such justices for the said county as might then be there, to answer, &c.: and that the Company and Davis, accordingly, appeared before the justices to whom the mandamus was addressed, on the day and at the place named.

The writ went on to state that it was proved before the last-mentioned justices that the said Lewis Davis, before and in the month of August, 1846, was, and then continued, seised in his demesne as of fee of and in the said piece of land over which the said road was made; and that the said L. D. made and constructed the said road and dedicated the same to the public before or in the said month of August, 1846: and that the said L. D. from the time of his so making and constructing the said road had, up to the time of the laying the said information, and thence to the time of the said hearing thereof, alone, at his own expense, repaired the said road, and that the said L. D. had made and built at *351] his *own expense a sewer under the said road, and brick drains communicating therewith, and man-holes and frames for the gratings in the said road; and that, whenever any person had required to make any communication with the said sewer or to interfere with the said road, such person had first applied for and obtained the leave of the said L. D.; and that no person had ever interfered with the said road or the management thereof, or made any communication with the said sewer, without first applying for and obtaining the leave of the said L. D.; and that no person had at any time the management of the said road except the said L. D., if the said facts so proved constituted him the said L. D. the person having the management of the said road within the meaning of the said last-mentioned Act of parliament: And that the said road was, during all the time aforesaid, a public highway; and that the said parish of Plumstead, in which the said road was and is

situate, had never adopted the said road and had never become liable to keep the said road in repair. The writ then alleged: That you the said justices, notwithstanding the premises, and that the same were then and there fully proved before you, then and there refused to determine that the said L. D. was, at the time of the said offence or of the laying or hearing of the said information, the person having the management of the said road within the meaning of the Railways Clauses Consolidation Act, 1845. Whereupon, &c. The writ then commanded that the justices should "forthwith proceed to determine that the said L. D. was, at the several times," &c., "the person having the management of the said road within the meaning of the said last-mentioned Act," or that they should show cause, &c.

*Return. That, at the time and place in the writ mentioned, [352 it was also proved before us the said justices that the said Lewis Davis did not, at the time of the laying or hearing of the said information or at the time of the said supposed offence in the said information mentioned, hold the office of surveyor of highways of the said parish: Wherefore we the said justices deemed it to be, and then and there thought it was, doubtful, under all the circumstances aforesaid, and upon the facts proved before us, and which are stated in the said writ, whether the said L. D. was, in point of law, the person having the management of the said road within the meaning of the 57th section of The Railways Clauses Consolidation Act, 1845:(a) and for this reason we the *said justices refused to determine that the said Lewis Davis [353 was, at the several times last aforesaid or any of them, the person having the management of the said road, within the meaning, &c.

Demurrer: and joinder.

Needham, for the Crown.—The facts on the record show that Davis was the "person having the management of the road" within sect. 57. Every person who dedicates a road to the public, and de facto or de jure manages it, is the manager contemplated by the Act. [Lord CAMPBELL,

(a) Stat. 8 & 9 Vict. c. 20, s. 53, enacts that if, in the exercise of powers granted by this or any "special Act," it be found necessary to cross, cut through, &c., any part of any road, either public or private, so as to render it impassable to passengers or carriages, or to the persons entitled to the use thereof, the Company shall, before commencing operations, make a sufficient road instead of the road to be interfered with, and shall maintain the same, &c.; and sect. 54 imposes penalties for omission. Sect. 56 enacts that the road interfered with shall be restored, if it can be compatibly with the formation and use of the railway, and, if not, a new one made, or a sufficient one substituted, by the Company, within six months if the road be turnpike, or within twelve if it be not, from the commencement of the first operation on the former road; unless an extension of time be consented to by the trustees or parties having the management of the road to be restored; and, if so, then within the extended period.

Sect. 57. "If any such road be not so restored, or the substituted road so completed as aforesaid, within the periods herein or in the special act fixed for that purpose, the Company shall forfeit to the trustees, commissioners, surveyor, or other person having the management of the road interfered with by the Company, if a public road, or if a private road to the owner thereof, 5*l.* for every day after the expiration of such periods respectively during which such road shall not be so restored or the substituted road completed; and it shall be lawful for the justices by whom any such penalty is imposed to order the whole or any part thereof to be laid out in executing the work in respect whereof such penalty was incurred."

C. J.—If he has dedicated the road, how does he differ from the rest of the public?] By doing the acts stated in the mandamus; repairing, draining, and exercising an exclusive control over the road. [ERLE, J.—Is no one else a manager, under the circumstances of this case?] The parish surveyor does not manage, the way not having been adopted by the parish. Unless Davis has the management, no one has. According to the writ, he does everything which trustees of a road could do. [Lord CAMPBELL, C. J.—Was he bound to repair?] He was, up to a certain time, by stat. 5 & 6 W. 4, c. 50, s. 23 (which lays down the rules for dedication of highways), in order that the parish might become liable afterwards. And it cannot yet be shown that any other person is liable, the parish not having adopted the road. [Lord CAMPBELL, C. J.—How long does the obligation to repair lie upon the dedicator? Suppose he sells the land. WIGHTMAN, J.—How would you indict him for the non-repair? Lord CAMPBELL, C. J.—The indictment, if preferred, must be *ratione tenuræ*; and what is the tenure that makes him liable?] His tenure of the soil of the road itself under such circumstances. [WIGHTMAN, J.—Is there any instance *of such an *354] indictment? Lord CAMPBELL, C. J.—Does any enactment throw the burden of obligation to repair upon a dedicator? The dedication is not for his own benefit.] He must take the consequences of his act. In *Roberts v. Hunt*, 15 Q. B. 17 (E. C. L. R. vol. 69), (a) Lord Campbell, C. J., said: "We are clear that sect. 23 does not touch the question of the road being a highway, but only exempts the parish from repairing it." It was observed in answer: "Then it becomes a highway to the inconvenience of the party dedicating, though not for his benefit." But Lord Campbell, C. J., answered: "He must calculate the consequences before he dedicates." [Lord CAMPBELL, C. J.—The inconvenience to the dedicator, there referred to, is the road being out of repair; not his having to repair it.] Till the conditions of sect. 23 are fulfilled, he cannot throw the burden of repair on the parish. [Lord CAMPBELL, C. J.—Here it never was on him.] His soil becomes a highway by his act; and he must keep it from being a nuisance. [WIGHTMAN, J.—How would you charge him in an indictment for nuisance?] The way would be a nuisance, by his act, if it were foundeours and dangerous. [WIGHTMAN, J.—That would be a simple case of non-repair. Lord CAMPBELL, C. J.—You have to show how the obligation arises. Liability by reason of dedication to the public is quite new.] An analogous case is put in 4 Bac. Abr. 225 (7th ed.), tit. *Highways* (E). "Where a new road has been made on a writ of *ad quod damnum*, in the same parish with the old road, the parishioners ought to keep it in repair; because being discharged from the repair of the old road, no new burthen is laid upon them; their labour is only transferred from one place to

(a) See *Fawcett v. York & North Midland Railway Company*, 16 Q. B. 610, 614 (E. C. L. R. vol. 71), note (a).

another. But, if the new road lies in another parish, the person who sued *out the writ, and his heirs, ought to keep it in repair; [*355 because the inhabitants of the other part gaining no benefit from the other road being taken away, it would be imposing a new charge upon them, for which they receive no compensation." Some one must be liable to repair: and the party who created the road is, if the parish be not. So a person enclosing open lands on each side of a highway is bound to repair the highway. [Lord CAMPBELL, C. J.—Liability *ratione clausuræ* is well known.] In *Rex v. Kerrison*, 3 M. & S. 526 (E. C. L. R. vol. 30), proprietors of a navigation were authorized by statute to cut a channel through the public highway for the purposes of their navigation: they did so, and built a bridge to carry the highway across, which bridge they afterwards repaired: and it was held that they were indictable if they suffered it to be out of repair. In *The Grand Surrey Canal Company v. Hall*, 1 Man. & G. 392, 401 (E. C. L. R. vol. 39), where the proprietors of a canal navigation were liable, under their navigation Act, to maintain bridges, Tindal, C. J., said: "If they build a bridge and allow persons to use it, why should not the usual consequences follow?" "There is here a statutory contract, by which the Company are bound to repair this bridge:" and the Reporters add, in a note: "Independently of the express provisions of the Act, throwing the repair of the whole of the bridges over the canal upon the Company, they would have been bound to maintain all bridges built across highways, the canal being made for private purposes, and not for the public benefit." See *Rex v. Inhabitants of Kent*, 13 East, 220, *Rex v. Inhabitants of Lindsey*, 14 East, 317, *Rex v. Kerrison*, 3 M. & S. 526 (E. C. L. R. vol. 30). (a) As the *bridge was not originally a public carriageway, and as it could not, for the reason already stated, [*356 become a county bridge, the dedication of it to the public seems to have thrown on the Company the liability to repair it for the public *as a carriageway*, in addition to the statutory liability imposed upon them by the Act. By such dedication the Company appear to have brought themselves within the principle of *Rex v. Kerrison*, and the other cases cited above." [Lord CAMPBELL, C. J.—No doubt that is the law. And it may be reasonable that, if a party for his own benefit creates a nuisance in the public way, he shall be liable to repair the place. But that does not apply to the dedication of a highway.] The dedicator of a highway, since stat. 5 & 6 W. 4, c. 50, knows that the parish is not liable until the acts are done which amount to an adoption; and with that knowledge he dedicates. He creates the thing to be repaired, and the liability. [Lord CAMPBELL, C. J.—Then all the landlords may continue liable in *sæcula sæculorum*.] The liability would go with the land. The road is, to certain intents, a highway, and must be so kept

(a) See the principle of these cases explained by Patteson, J., delivering the judgment of the Court in *Regina v. The Inhabitants of the Isle of Ely*, 15 Q. B. 827, 843, 4 (E. C. L. R. vol. 69).

as not to become a nuisance, with reference to what it is. Davis, in this case, has maintained sewers and man-holes on the line of highway; without his care they may become a nuisance and an obstruction; and he would be answerable for this, according to *Roberts v. Hunt*, 15 Q. B. 17 (E. C. L. R. 69). That he has in fact done acts of repair, is not denied. [Lord CAMPBELL, C. J.—If he has done them voluntarily, it is nothing. If he had been compelled, you might perhaps have been entitled to judgment by reason of his being the manager.] He has done it under a legal liability, to obtain the benefit of stat. 5 & 6 W. *357] 4, c. 50, s. 23. [Lord CAMPBELL, *C. J.—Has he done it eo intuitu?] The Court will intend so. The language of stat. 8 & 9 Vict. c. 20, sects. 53 to 57, is very general, and expressly includes both public and private roads. It is clearly intended that, in every case where a highway is severed and not restored, a forfeiture should be given to some one; but the remedy must be lost in a multitude of cases, if this writ be not maintainable. [WIGHTMAN, J.—To whose use would the forfeiture be in this case? If the prosecutor succeeded, it seems he might put it into his own pocket. Lord CAMPBELL, C. J.—A surveyor, if he recovered it, could not appropriate it otherwise than to the repair of the particular road.] The forfeiture is expressly given to the trustees, commissioners, surveyor, “or other person having the management.”

Watson, contra, was stopped by the Court.

Lord CAMPBELL, C. J.—The whole question is whether the prosecutor Davis is a person having the management of this highway, within stat. 8 & 9 Vict. c. 20, s. 57. If he be, he is entitled to this remedy; otherwise not. I think that a person “having the management,” within this clause, must bear a character corresponding to those mentioned before, of trustee, commissioner, or surveyor. How is Davis invested with such a character? Only, as is alleged, because the soil of the road was his and he dedicated it to the public: no act of adoption has been done by the parish; but he has performed repairs since the dedication. If Mr. *Needham* could have shown that the dedicator of a road, under such *358] circumstances, is bound to keep it in repair, *it would be true that he has the management within sect. 57. So, a person bound to repair *ratione tenuræ* might very reasonably be considered the manager within this clause. But how is the dedicator of a road bound by law to repair it? It is clear that he was not so before stat. 5 & 6 W. 4, c. 50. Then does that Act, exempting the parish from repair till certain conditions are fulfilled, throw the burden on the dedicator? Clearly it has no such effect. According to *Roberts v. Hunt*, 15 Q. B. 17 (E. C. L. R. vol. 69), the road, under the present state of things, is so far a public highway that the Company may be liable to indictment if they create obstructions in it and do not remove them: but they are not liable to this penalty. The dedicator is not a person

whom the Legislature intended to burden with repair. The road, upon dedication, is a highway, to be used by the public when fit for use. If a positive obstruction be created in it, the party causing such obstruction is liable for so doing: but, if the road be simply unfit for use, from the state of the weather, or from mere want of repair, the public lose the use of it, but no person can be burdened with the repair. *Rex v. Kerrison*, 3 M. & S. 526 (E. C. L. R. vol. 80), is a very different case: there the parties held liable had cut through the road for their own peculiar benefit, and were therefore obliged to repair the bridge which they had laid to carry the road over the divided part. So, by the law of England, if a highway runs through open ground, and a neighbour, for his own benefit, encloses the way on each side, he is bound to repair it. But there is no authority for such an obligation upon persons dedicating a road as in the *present case. It does not appear to have been done for the party's own benefit. It may have been [*359 so; but we may easily conceive that it was not. He has done some repairs; but it is not shown that he was bound to do them. I think that, after dedication, he was, in this respect, situated as a mere stranger; and therefore that the mandatory part of this writ cannot be enforced.

WIGHTMAN, J.—The question is, not whether the Company might have been indicted for obstructing what we might admit to be, for that purpose, a highway, but whether Davis is entitled to have the statutory penalty awarded to him as manager of the highway. Now the Act seems to treat the "person having the management" as one on whom a duty is cast, by joining him with trustees, commissioners, and surveyors. Is there then any duty thrown upon the person dedicating a highway, under the circumstances here alleged? Before stat. 5 & 6 W. 4, c. 50, the parish was liable to repair after dedication of a road, the dedicator not. Does the statute itself, or the state of law consequent upon the statute, throw any duty upon the dedicator? He is a mere volunteer if he does any repairs: the statute lays him under no obligation to repair the road, or manage it. The prosecutor, therefore, is not entitled to this forfeiture.

ERLE, J.—It is unnecessary to decide whether or not an indictment would have lain against the Company for this obstruction. The penalty given by stat. 8 & 9 Vict. c. 20, s. 57, is for interfering with a public right. The prosecutor, to enforce that penalty, must come within one *of four classes; trustee, commissioner, surveyor, or other per- [*360 son having the management of the highway. The Legislature has shown its intention that he should be clothed with some duty to the public. Now, on the facts disclosed here, Davis appears to have acted throughout as a private land proprietor, and for private purposes, whatever may have been his motive. He does not show himself clothed with any duty to repair, or to protect the rights of the public as pas-

sengers. And therefore he fails to bring himself within any of the classes to which the law gives a power of enforcing these forfeitures.

CROMPTON, J.—There might be some difficulty in saying whether or not, in a case like this, the Company might be indicted: but I think that Davis was not a manager of this highway within the meaning of the statute. He would not be indictable for the non-repair of it, more than the grantor of a private road. There is no mode in which an indictment could be framed against him. The only doubt I had was, whether he might not be deemed a manager in a larger sense than a mere surveyor is so. But I think he is not in any view a manager: no public duty is cast upon him: he spends his own money for his own purposes, and is a mere volunteer. Judgment for defendants.

***361] *The QUEEN v. The Justices of LANCASHIRE. April 21.(a)**

Where an order is made by two county justices, under stat. 8 & 9 Vict. c. 126, s. 62, for the maintenance of a lunatic pauper removed to the county asylum from a borough within the county, having a separate Court of Quarter Sessions, the appeal against such order lies exclusively to the borough Quarter Sessions.

ARCHBOLD, in last Hilary term, obtained a rule nisi for a mandamus to the justices of the county of Lancaster, commanding them to enter continuances and hear an appeal of the guardians of the poor of the Conway Union and the overseers of the parish of Llandudno in the county of Carnarvon, against an order of two justices of the county of Lancaster, adjudicating the settlement of J. P. a lunatic pauper, confined in the county asylum of the said county, to be in Llandudno, and ordering the costs of his maintenance to be paid by the Conway Union.

It appeared from the affidavits that, in March, 1851, two justices, in the commission both for the borough of Liverpool and for the county, made, at Liverpool, an order upon the parish of Liverpool, to which the pauper was then chargeable, and which is wholly within the said borough, for the removal of the pauper to the county Lunatic Asylum, which is also the public Lunatic Asylum for the borough. In August, 1851, two other justices, also in the commission both for the borough and the county, made an order at Liverpool, adjudicating the settlement of the pauper to be in Llandudno, and ordering the costs of his removal to the
***362]** asylum, and of his *future maintenance, to be paid by the Conway Union, in which Llandudno is comprised. The Conway Union appealed against this order. The borough of Liverpool is a borough within the Municipal Corporation Act, with a special commission and a separate court of quarter sessions, and was, before that Act, by charter,

(a) And Thursday, April 23d. The same Judges were present on both days.

a borough, with a recorder and a court of quarter sessions; and there is no non-intromittant clause in either the charter or the commission of the peace. The justices for the county have concurrent jurisdiction within the borough with the justices for the borough. On the appeal coming on for hearing at the Quarter Sessions for the county, it was objected, for the respondents, that the county Sessions had no jurisdiction, and that the appeal should have been to the Court of Quarter Sessions for the borough; and the county Sessions refused to hear the appeal.

Pashley now showed cause.—The appeal against this order of maintenance can lie only to the borough Quarter Sessions. The order is made under the provisions of stat. 8 & 9 Vict. c. 126, s. 62; and that section provides that “the guardians of any union or parish, or the overseers of any parish, township, or place, affected by” any “such order, may appeal against the same in like manner as if the same were a warrant of removal.”(a) And in *Regina v. Justices of Glamorganshire*, 13 Q. B. 561 (E. C. L. R. vol. 66), and *Regina v. Inhabitants of St. Peter, Barton on Humber*, 17 Q. B. 630 (E. C. L. R. vol. 79), it was held that orders for the maintenance of pauper lunatics, and thus, indirectly, orders for their removal, were within the provisions of that section. Now *in *Regina v. The Justices of Suffolk*, 2 Q. B. [*363 85 (E. C. L. R. vol. 42), it was held that stat. 5 & 6 W. 4, c. 76, s. 105, transferred to the Quarter Sessions held for boroughs under that Act the jurisdiction to hear appeals against warrants of removal made by justices for the borough, which, by stat. 8 & 9 W. 3, c. 30, s. 6, had been given to county Quarter Sessions; and therefore that, where the removal is from the borough, the appeal against the order lies to the borough Quarter Sessions. And, in *Regina v. Recorder of Liverpool*, 15 Q. B. 1070 (E. C. L. R. vol. 69), it was decided that this jurisdiction of the borough Quarter Sessions was not affected, where such warrant of removal issued in the borough, by the fact of its having been issued by justices for the county, having concurrent jurisdiction with justices for the borough. The appeal against the order of maintenance in the present case, therefore, inasmuch as, by stat. 8 & 9 Vict. c. 126, s. 62, it is to follow the same rule as an appeal against an ordinary warrant of removal, lies to the Quarter Sessions of the borough, the removal having been from the borough.

Archbold and *Welsby*, contra.—The appeal lies to the county Quarter Sessions. The justices for the borough may make an order of removal, but not an order of maintenance. [Lord CAMPBELL, C. J.—They cannot make an order of maintenance as justices for the borough; but justices in the commission both for the county and for the borough may make an order of maintenance, in respect of a removal from the borough, in the first of their two capacities.] If, as justices for the borough,

(a) See stat. 16 & 17 Vict. c. 97, ss. 1, 108.

*364] they have no power to make an order of *maintenance, it seems absurd to contend that, as such, they have appellate jurisdiction with respect to such orders. [Lord CAMPBELL, C. J.—There is no absurdity; the only question is, whether the Legislature intends to give them such jurisdiction.] There is no instance, except under stat. 8 & 9 W. 3, c. 80, s. 6, of an appellate jurisdiction being given in cases where there is no original jurisdiction. In *Regina v. Recorder of Liverpool*, 15 Q. B. 1070 (E. C. L. R. vol. 69), the order appealed against was an order of removal which the justices for the borough, as such, had a right to make. [Lord CAMPBELL, C. J.—But it was made by justices for the county.] *Regina v. Justices of Glamorganshire*, 13 Q. B. 561 (E. C. L. R. vol. 66), decides only that the form of proceedings, after the hearing of the appeal has commenced, is to be the same as in the case of an appeal against a warrant of removal. The words “in like manner,” in sect. 62, refer only to the formal proceedings connected with the appeal, not to the tribunal before which they are to be carried on. Sect. 62 goes on to provide that the clerk of the peace for the county may defend the appeal in certain cases. It cannot have been intended that he should defend it at the borough Quarter Sessions. [Lord CAMPBELL, C. J.—He is to defend where the pauper is chargeable to the county. COLERIDGE, J.—Why should he not defend an appeal to the borough Quarter Sessions? He supports the interests of the county which is chargeable.] *Regina v. Justices of Lancashire*, 12 Q. B. 305 (E. C. L. R. vol. 64), is directly in point for the appellants.

Lord CAMPBELL, C. J.—This case turns entirely on the construction of stat. 8 & 9 Vict. c. 126, s. 62; and *we have merely to see *365] what the Legislature has there enacted. No doubt it had the power to give an appeal to the borough Quarter Sessions against an order made by two justices for the county; and, as there is no appeal unless given by the Legislature, we must look at the Act to ascertain whether such an appeal is given. Now sect. 62 enacts that there may be an appeal against an order for the maintenance of a pauper lunatic “in like manner as if the same were a warrant of removal.” Then, what is the appeal given against an order of removal? It lies to the Quarter Sessions of the place from which the removal is made. The appeal, therefore, against the order of maintenance in the present case, though the order was made by justices for the county, lies to the Quarter Sessions for the borough of Liverpool, the removal having been from a parish within that borough. This follows necessarily from our decision in *Regina v. Recorder of Liverpool*, 15 Q. B. 1070 (E. C. L. R. vol. 69), in which *Regina v. Justices of Lancashire*, 12 Q. B. 305 (E. C. L. R. vol. 64), was brought under our consideration, and where we held that an appeal against an order of removal from a borough, although

made by justices for the county, lies to the Quarter Sessions for the borough, and not to the Quarter Sessions for the county.

COLERIDGE, J.—I am of the same opinion. It must be conceded that an appeal of this kind can exist only by a positive statutory enactment. To give effect to stat. 8 & 9 Vict. c. 126, s. 62, we must construe the words “in like manner as if the same were a warrant of removal” as including the whole subject-matter of the *appeal provided for. [*366 That being so, the question, what appeal is given by the statute against a warrant of removal, is decided by *Regina v. Recorder of Liverpool*. *Regina v. Justices of Lancashire* has been referred to; but in that case, which was fully considered in *Regina v. Recorder of Liverpool*, the question turned rather on the original jurisdiction of the justices to make the order of removal, than on the jurisdiction of any particular court to hear an appeal against it.

CROMPTON, J.—This Court has more than once decided that, where the removal is from a borough, the appeal against the order of removal lies to the Quarter Sessions for the borough. The only question here is, whether, under the same circumstances, an appeal against an order for the maintenance of a pauper lunatic, removed to an asylum, also lies to the borough Sessions. It is clear, from the language of sect. 62, that appeals of the latter description are to follow the same rule as appeals against orders of removal, and therefore lie to the Quarter Sessions of the place from which the removal was. In the present case, therefore, the appeal must be to the Quarter Sessions for the borough.

(No fourth Judge was present.)

Rule discharged.(a)

(a) See *Regina v. Justices of Salop*, 4 E. & B. 257 (R. C. L. R. vol. 82); *Regina v. Justices of Buckinghamshire*, ib. p. 259, note (b).

*STAPLETON v. CROFTS. April 23. [*367

Stat. 14 & 15 Vict. c. 99, does not remove the objection to admitting as a witness the wife of a party to the record. So held by Lord Campbell, C. J., Wightman and Crompton, J.s.; Erle, J., dissentiente.

ASSUMPSIT for goods sold and delivered. Plea, Non assumpsit. Issue thereon.

On the trial, before Erle, J., at the sittings at Westminster in last term, the defendant's wife was called as a witness for the defendant. The evidence was objected to; but the learned Judge admitted it. Verdict for the defendant.

In the ensuing term *Huddleston* obtained a rule nisi for a new trial, on the ground of the improper reception of evidence.

Montague Chambers and *Welsby* now showed cause.—Stat. 14 & 15 Vict. c. 99 takes away the objection to the admissibility of a person

named on the record, or interested in the suit. The defendant himself may therefore be called. The ground of the objection to the wife as stated in Co. Litt. 6 b, is twofold. First, "quia sunt dux animæ in carne unâ;" an objection which is at once removed by the statute taking away the objection to one-half of the united person. The other objection is of general policy; because "it might be a cause of implacable discord and dissension between the husband and wife, and a means of great inconvenience:" but that reason has not been acted on; as in *Annesley v. Earl of Anglesey*, 17 How. St. Tr. 1139, 1276, a wife was *368] admitted to give evidence that her *husband was not to be believed upon his oath. It must be admitted that there is a recent decision of the Exchequer, in *Barbat v. Allen*, 7 Exch. 609,† against the admissibility of the wife.

Huddleston and Holl, contra.—The reasons given in *Barbat v. Allen* are strong; and the decision is expressly in point.

Lord CAMPBELL, C. J.—I regret to be obliged to say that, in my judgment, the rule must be absolute; for my private opinion is that it would be an improvement on the law to admit the testimony of married persons, for or against each other, subject to some restrictions. I think they ought not to be permitted to disclose confidential communications, or to criminate each other: but, subject to limitations, I think that the admission of their testimony would forward the ends of justice. However, I am now to declare what the law is; and for that purpose I must look to the statute as it has received the Royal assent. I cannot take into consideration the history of the bill, or speculate on the intentions of those who promoted or altered it, but must look to the Act as it is. Now it is quite clear that before Lord Denman's Act (6 & 7 Vict. c. 85), the wife could not be called for or against her husband. When the issue was between strangers, the husband and wife might be called, though they contradicted each other, even to the extent to which it was carried in *Annesley v. Earl of Anglesey*, 17 How. St. Tr. 1276; but where the husband himself was the party the wife could not be called for or against *369] him. One *reason given by Lord Coke in Co. Litt. 6 b, and adopted by Lord Hardwicke,(a) is the preservation of the peace of families. Such being the law, and one of the reasons for it, Lord Denman's Act contained an express provision that that Act should not render admissible parties to the record, or their husbands or wives. Stat. 14 & 15 Vict. c. 99 does not, as I think, either expressly or impliedly admit the testimony of the wife which was before inadmissible. Sect. 1 repeals a part only of the proviso in Lord Denman's Act: but, had it repealed the whole of that proviso, the case of the wife would not be within the purview of the Act, which was pointed only at objections on the ground of interest. The enabling clause of stat. 14 & 15 Vict. c. 99 is sect. 2, which certainly does not expressly admit the wife

(a) *Barber v. Dixie*, Ca. K. B. Temp. Hardwicke, 264.

of the party; but it is urged that it does so impliedly, inasmuch as the wife and husband are one person. But the maxim cannot be understood in this sense. It might as well be said that under a *ca. sa.* directed against the husband the wife might be taken in execution because she and the husband were one.

Stress is laid on sect. 3, where it is enacted that the husband and wife shall not be competent or compellable to give evidence against each other in any criminal proceeding. If there were such language as left it doubtful whether the construction of the Act was such as to admit the evidence of the wife, this would afford an argument in favour of that construction; but I cannot think it is sufficient by implication to make them admissible in other than criminal proceedings. Such has been the opinion of Lord Truro,^(a) and of the Court ^{of Exche-}quer.^(b) If I entertained a different opinion it would be my duty [*370] to express it, until the decision of a higher Court set me right; but I agree with them.

WIGHTMAN, J.—It is contended that the objection to the admissibility of the wife is removed by stat. 14 & 15 Vict. c. 99. That Act, however, in its terms applies only to “the parties” to any suit. Now the wife of a party is not herself a party to the suit; and the terms of the Act do not embrace this case. But, independently of the terms of the Act, I think that the object appears to have been to complete the removal of objections on the ground of interest: and the objection to admitting the wife of a party is not merely on the ground of her identity in interest with her husband, but depends upon a broader view of the relation of husband and wife, and on the interest which the public have in the preservation of domestic peace and confidence between married persons.

CROMPTON, J.—I am of the same opinion, and should not have considered the question doubtful, were it not for the opinion which I know my brother Erle is about to deliver on the opposite side.

It seems to me entirely a question on the construction of this Act. I disclaim as grounds for my opinion any reference to policy, or what I think ought to have been enacted, or even what I may believe those who passed the Act might have wished to express in it. I construe the Act as it is.

*Before that Act the wife, for whatever reason, clearly was [*371] inadmissible. Now, if we look at sect. 1, which repeals a portion of Lord Denman’s Act, it is a strong observation that the repealing provision stops where it does. It repeals part of the original enactment which affected that which was the subject of legislation, so as to clear the ground for the enactments to come; and in doing so it stops short of the incompetency of the wife, which, it is contended, was part

(a) *Perdval v. Caney*, Chanc. 26th January, 1852.

(b) *Barbat v. Allen*, 7 Exch. 609.†

of what was to be removed. But the enabling and enacting clause is sect. 2. That section contains no words that can embrace the case of a wife not a party to the record. Perhaps when the husband and wife are joined on the record the word "party" may be wide enough to include both; but that is not the case here. Then follows sect. 3, the language of which, when I first read it, made me, and I dare say made every one else, doubt and look back to see whether the wife was not made a competent witness. It is difficult, looking merely at the Act, to see an object for this section; it may have been introduced *pro majore cautela*: but, whether that be the object or not, there is not enough in it to show that the Legislature meant to include the wife in the enabling clause. I think that, taking the whole statute together, the intention appears to have been to exclude her from the enactment: and for this I rely mainly on the language in sect. 2.

It is said that the ground on which the wife is rejected is the identity in interest between her and her husband, the party to the record. If that were so, it would not follow that because the one was enabled to be a witness the other was. The ground of objection, the interest, *372] remains; but the Legislature has by express enactment *said that it shall no longer be an objection to the admissibility of the party: the objection to the admissibility of the wife is left untouched. The Legislature might have taken away the objection to both; but they have not chosen to do so: and, there being no words enacting that the wife shall be admissible, I think she continues inadmissible.

ERLE, J.—I am of opinion that stat. 18 & 14 Vict. c. 99, s. 2, rendering parties to a suit competent witnesses, has rendered the wives of parties also competent.

The law relating to exclusion of evidence on account of interest gave effect to the principle of uniting the interest of husband and wife. If the husband was excluded on account of interest, so was also the wife on account of her united interest; and, if the capacity of the husband was restored, the wife became thereby also capable. Although the wife had no direct interest during coverture in personal property, she was taken to have an indirect interest derivative from that of her husband.

The party to a suit was both excluded and exempted on account of his interest. For the same reason and from the same union of interest the wife of a party was also exempted and excluded. If capacity was restored to the parties by judgment by default, by *nolle prosequi* or otherwise, the capacity of the wife was also restored thereby. It seems to me to follow that, when the incapacity of parties is taken away by statute, the incapacity of the wives of parties should also cease, and the union of capacity or incapacity be still maintained.

This brings me to the question whether there was any other principle *373] for excluding the wife of a party besides this union of interest and privilege between husband and wife. Upon the affirmative

side, authorities are cited for exclusion of the wife with a view to preserving the peace of families; they are collected in Taylor on Evidence, vol. 2, p. 899,^(a) where it is said the admission of such testimony would lead to dissension and unhappiness, and probably to perjury, and because the confidence subsisting between husband and wife should be sacredly cherished.

There is no doubt that the law most carefully protects the interests connected with marriage, and established the union of interest above mentioned for the purpose of domestic union, and excluded the testimony of the wife, where the husband was excluded, on account of this union; and the expressions above cited, if confined to the exclusion of the wife when the husband is excluded, have a definite meaning, capable of a practical application: but, if they are carried beyond this limit, and are supposed to introduce tendency to domestic discord as a ground of exclusion, they will be found to be contrary to known principles of evidence, and to be incapable of being consistently applied. For, if this ground of exclusion existed, it would apply to other witnesses, as well as to parties, their domestic peace being equally important. But it is clear with respect to witnesses, not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may mutually contradict and discredit each other upon matters full of family dissension, as freely as if the marriage was null.

Even if it could be supposed that the law regarded only the domestic peace of parties, and protected their *confidence, still the supposed ground of exclusion is not consistently applied; for, if a husband is assaulted or libelled, he may seek redress either by action or indictment. In either form he is in substance the party. If he proceeds by action, he and his wife were incompetent. If by indictment, both are admissible either to corroborate, or contradict or discredit each other. Now, if the principle of excluding the wives of parties was protection of domestic peace and confidence, the wife ought to be excluded equally in both cases: but she was excluded only in the action, where, as the husband was also incompetent, it seems better reasoning to attribute her exclusion to the uniform principle of union, than to suppose a regard for domestic peace in the civil Court, to be neglected in the criminal Court.

With respect to the protection of confidential communications between husband and wife, there seems good reason for such protection at all times: but no such principle has been brought into practice.

The decisions excluding the wives of parties have been accompanied with general declarations in favour of such protection. But, as the exclusion extended to all the testimony of the wives of parties, whether it was confidential or not, and as no protection was given to conjugal

(a) See 2d ed. Vol. 1, p. 729. Vol. 2, p. 1058, et seq.

confidence in respect of the wives of witnesses, not parties, who are as much within the reason of the rule, if it existed, as the first-mentioned class, I think the rule has not yet been established.

As to the authorities, most of the decisions for the exclusion of the wives of parties were given in cases when the husband was excluded, and so are consistent with the principle of union of admissibility. In *Bentley v. Cook*, 3 Doug. 422 (E. C. L. R. vol. 26), the wife was plaintiff, and so the husband *was excluded; in *Davis v. Dinwoody*, *375] 4 T. R. 678, the wife's trustees were plaintiffs on her behalf, and so the husband was excluded; and thus in *Hawksworth v. Showler & Boyce*, 12 M. & W. 45,† the wife of Boyce was excluded from giving evidence for Showler, because she was the wife of a party to the issue under trial, who was incapacitated either for or against himself, and the same incapacity extended to the wife.

The decisions excluding the wife where the husband was not excluded, upon some general purpose of promoting conjugal peace, appear untenable.

In *Broughton v. Harpur*, 2 Ld. Ray. 752, the question in ejectment was whether the plaintiff was son and heir of Hannah Jaques; and the first wife of Jerome Jaques was called by the defendant to prove that his supposed marriage with Hannah was null because she had been previously married and was still alive, and was rejected on the ground, as mentioned in the report, that she swore to her advantage to get a husband, but on the ground, as mentioned in some later cases, (a) that she would criminate her husband of bigamy, and in others, (b) that she would occasion dissension with her husband. But her evidence would operate nothing in regaining her husband; nor would it criminate him more than the public offer of it: and dissension was not probable; and according to the law, as now settled, the witness would be admitted.

In *Rex v. Cliviger*, 2 T. R. 263, upon a question of the settlement of a woman as a wife, the former wife of the alleged husband was held *376] inadmissible to prove the former *marriage, and contradict the husband, because it might tend to criminate him of bigamy and perjury. Here also the public offer of the evidence had all the tendency that the evidence would have had; and here also evidence essential for ascertaining the truth was excluded lest a tendency should be created which already existed. The principle of exclusion laid down in this decision was received with dissent by the Court in *Rex v. All Saints Worcester*, 6 M. & S. 194, and in *Rex v. Bathwick*, 2 B. & Ad. 639 (E. C. L. R. vol. 22); and in these cases the exclusion of the wife was said to be confined to cases where the husband was a party. They therefore in effect deny any direct ground of exclusion on account of domestic peace, as applicable to all witnesses. In *O'Connor v. Majoribanks*, 4

(a) See *Rex v. All Saints, Worcester*, 6 M. & S. 194.

(b) See *Rex v. Cliviger*, 2 T. R. 267.

M. & G. 435 (E. C. L. R. vol. 43), the widow was held incompetent to prove the authority of her deceased husband to pledge some property for a loan, on the ground that confidential communication between husband and wife should be protected: and, although the communication in question was not confidential but intended to be divulged, the Court thought it necessary to exclude evidence of all communications, to secure the exclusion of those which were confidential. I may be allowed to doubt this necessity, and to inquire whether it is satisfactory to sacrifice the interest of truth by excluding essential evidence for the sake of protecting a confidence which never existed.

These cases lead me to the conclusion that from the union of interest between husband and wife there was a union of incapacity, and upon a restoration of capacity to the one the other is also rendered admissible.

The legislative authority for the admission of wives is *strong. [*377 In the county courts they are made competent; there has been ample experience of their evidence; and no objection has been made. In bankruptcy the necessity for examining the wives of bankrupts has been long recognised; and, under the statute now to be construed, the wives, if parties to the record, are admissible for or against their husbands; and inconsistency is attributed to Parliament if it be supposed to have intended that the wives of parties generally should be excluded, but the wives of parties, having an individual as well as conjugal interest, should be admissible.

If the question may be considered with reference to the interest of truth, it is clear the exclusion of essential information as a means for finding truth is absurd. It is not doubted that wives often possess essential information as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she has happened to witness.

If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law: these evils are certain; and, if the notion of a compensating good in the promotion of domestic happiness by rendering the wife powerless as a witness be analyzed, I believe it will be found illusory. The idea that husbands generally would suborn their wives to perjury, and persecute them if they spoke truth, is, to my mind, unworthy of the time; there is no reason for supposing that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses: and, if, by reason of the exclusion of the wife, the husband has to suffer an adverse judgment *contrary to [*378 truth, and the consequent loss, he would dissent with much reason from the zealous declarations that such a mean for protecting the peace of his family and the sanctity of his marriage was better than administering the law according to truth.

These observations apply to the present case; for the husband was examined, and did not understand the matters in question, which had been managed by his wife. If she had been excluded the verdict would have been for the plaintiff, and the defendant would have been made liable to a demand contrary to the truth. As these considerations were in my mind before the judgment of the Exchequer in *Barbat v. Allen*, 9 Exch. 609,† and as they refer entirely to the effect of the second section, which was not much discussed in that case, I trust I am not wanting in deference if I say that my opinion is not changed.

Rule absolute.(a)

(a) Reported by C. Blackburn, Esq.

BROUGHTON v. JACKSON. April 23.

To a count in trespass for assaulting and falsely imprisoning plaintiff, and putting him in irons, defendant pleaded: That he was commander of one of the Queen's ships of war, at sea; that plaintiff, at the times when, &c., was steward of the ship, and, as such, was servant to defendant on board the said ship, and had access to his cabin, and had the charge of his goods and chattels there; that on two occasions, just before the times when, &c., moneys had been feloniously stolen from defendant's possession out of a desk then being in his said cabin; that upon each occasion the desk had been clandestinely opened by means of a key, and the plaintiff had access to and could have obtained the key of the said desk and unlocked the same and taken away the said moneys; and defendant then believed that no other person had or could have obtained access to the key of the said desk without plaintiff's knowledge; Wherefore defendant, having probable cause of suspicion, and suspecting the plaintiff for, among other things, the causes aforesaid, to have been guilty of the stealing, &c., did, as such commander, and as he lawfully might for the cause aforesaid, gently lay hands, &c., and put plaintiff in irons, and so keep him (the same being a reasonable mode of detainer) for a reasonable time until defendant, as commander, &c., could examine into the circumstances of suspicion against plaintiff according to law and for the purpose of reporting to the Lords of the Admiralty or bringing plaintiff to trial, if it appeared right to do so. Replication, *De Injuria*.

After verdict for defendant on this plea,

Held, on motion for judgment non obstante verdicto,

That in an action for false imprisonment on a criminal charge by a person not being a peace officer, mere belief is not a sufficient justification, but facts must be shown on which the belief was grounded, in order that the Court may judge whether or not the defendant had probable cause for arresting. That all the facts need not be set out, but only enough to show ground of reasonable suspicion. That the facts alleged here were sufficient, at least after verdict; and, per Lord Campbell, C. J., they would have been so on demurrer.

And that, if the plaintiff meant to contend that the facts did not justify putting in irons as a mode of detainer, he should have new assigned.

TRESPASS. The declaration stated that defendant, on, &c., and on
 *379] divers other days, &c., with force and arms assaulted the plaintiff, and then beat, bruised, and ill treated him, and then put the plaintiff in irons, and then imprisoned him, and then kept and detained him in prison, without any reasonable or probable cause whatsoever, for a long space of time (to wit), the space of one month then next following, contrary to law and against the will of the plaintiff, whereby plaintiff was greatly hurt, &c., and was prevented from attending to his lawful affairs, and injured in his credit.

Pleas. 1. Not Guilty. Issue thereon.

2. As to the assaulting, beating, and ill-treating plaintiff, and putting him in irons, and imprisoning and keeping and detaining him, in the declaration mentioned: That, before and during all the time in the declaration mentioned (to wit), on 18th September, A. D. 1851, and on the said other days therein mentioned, defendant was a Lieutenant in the Royal Navy and Commander of Her Majesty's steam-vessel and ship of war "Lucifer," then belonging to the Royal fleet, and then lying and being on the high seas (to wit), in Douglas Bay, off the Isle of Man. And that, before and at the said times when, &c. (to wit), on 16th September, in the year aforesaid, the plaintiff was steward of and on board the said vessel and belonging to the fleet, and, as such steward, was the servant of defendant, and had access to the cabin of defendant in the said ship, and the charge of the goods and chattels of defendant then being in such cabin: and, plaintiff so being such servant as aforesaid, divers moneys of defendant (to wit), two *pounds and ten [380 pounds respectively, the property of defendant, had been and were feloniously stolen, taken, and carried away from and out of the possession of defendant, and out of a certain desk then being in the said cabin, upon two several occasions just before the said times when, &c., to wit, on the day and year last aforesaid: And defendant saith that, upon each occasion on which the said sums of money were respectively stolen, the said desk had been clandestinely opened and unlocked for that purpose by means of a key; and that the plaintiff had access to and could have obtained the key of the said desk, and could have unlocked and opened the same and taken and carried away the said moneys upon the said several occasions aforesaid: And defendant saith that he then believed that no other person had or could have obtained access to the key of the said desk without the knowledge of the said plaintiff: Wherefore defendant, having good and probable cause of suspicion and vehemently suspecting the plaintiff for, among other things, the causes aforesaid, to have been guilty of or concerned in the stealing and carrying away of the said moneys of defendant, did, at the said times when, &c., as such commander as aforesaid, and as he lawfully might for the cause aforesaid, gently lay hands upon the plaintiff, and did put him in irons, and so did keep and detain him (the same being a reasonable mode of detainer), as in the declaration mentioned, for a reasonable time, to wit, until defendant, as commander of the said ship in which the said felony was committed, could examine into and investigate the circumstances of suspicion against the plaintiff according to law, and for the purpose of making a due report of all the said circumstances to and for the information of the Lords of *the [381 Admiralty, or of bringing the plaintiff to trial on the said felony, if upon investigation it appeared to him the defendant right and proper so to do. And defendant avers that he did, as such commander, and

within a reasonable time in that behalf, to wit, on the day and year last aforesaid, examine into and investigate the said circumstances of suspicion against the plaintiff touching the said felony, and did afterwards, and within a reasonable time in that behalf, to wit, on the day and year aforesaid, discharge and release the plaintiff from further custody and detainer. And defendant saith that by means of the aforesaid premises the plaintiff was assaulted and imprisoned, and kept and detained, as in the declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid: which are the alleged trespasses in the introductory part of this plea mentioned, and whereof plaintiff hath above complained against defendant. Verification.

Replication: De Injuriâ. Issue thereon

On the trial, before Lord Campbell, C. J., at the sittings in Middlesex after last Michaelmas term, a verdict was found for the plaintiff on the first issue and for the defendant on the second. *Prideaux*, in last Hilary term (January 15th), moved for a rule to show cause why there *382] should not be a new trial,^(a) or judgment for the *plaintiff on the second issue, non obstante veredicto. The Court granted a rule nisi for judgment non obstante veredicto, and ordered the case to be put into the special paper, and argued as on a concilium.

Keating now showed cause.—The question is, whether the circumstances pleaded as the cause of detention are a sufficient justification after verdict. It must be admitted that this is a matter to be decided by the Court. The authorities are in favour of the defendant. In *Mure v. Kaye*, 4 Taunt. 34, which was cited in moving, the averments on which the justification mainly rested were that certain things were done “suspiciously;” no rational ground of suspicion being shown upon the record. That was a much weaker case than the present; and the argument was on demurrer. Slighter grounds of charge than are shown here were held to support the justifications in *Beckwith v. Philby*, 6 B. & C. 635 (E. C. L. R. vol. 13), and *Musgrove v. Newell*, 1 M. & W. 582,† S. C. Tyr. & G. 957. In the latter case, though the plaintiff had a verdict on the first trial, Alderson, B., on the second, “directed a nonsuit upon the ground that there was probable cause.”^(b) In *Davis v. Russell*, 5 Bing. 354 (E. C. L. R. vol. 15), where the suspicion

(a) The grounds were that the verdict was against the evidence, and that the Lord Chief Justice had left it to the jury to say whether or not the putting in irons was, as alleged in the plea, “a reasonable mode of detainer;” this (as *Prideaux* contended) being a point of law, which the Judge himself ought to have determined. [Lord CAMPBELL, C. J.—Was not it for the jury to say whether, under the circumstances, it was reasonable to put a man in irons? *WIGHTMAN, J.*—If the words had been “a necessary mode of detainer,” could there have been any doubt? Suppose the question to have been whether or not the plaintiff made so much resistance that confinement in irons became necessary: surely that was for the jury.] If that was so, then the necessity was not made out by the evidence. *Wright v. Court*, 4 B. & C. 596 (E. C. L. R. vol. 10), shows this. The Court (Lord Campbell, C. J., Patteson and Wightman, J.) refused a rule nisi for a new trial.

(b) Alderson, B., so stated in *Panton v. Williams*, 2 Q. B. 169, 186 (E. C. L. R. vol. 42).

was grounded wholly upon an anonymous letter, the Judge told the jury (in substance) that the facts, if believed by them, *were probable cause; and this was held a sufficiently good direction. [*388 [CROMPTON, J.—The case of most frequent occurrence is when facts are alleged as ground for carrying the plaintiff before a magistrate, not for the defendant's taking the law into his own hands.] The captain of a ship holds, in some sense, the situation of a magistrate, while on board his ship. *West v. Baxendale*, 9 Com. B. 141 (E. C. L. R. vol. 67), though the decision turned on points not raised by the present case, shows that the defence is sufficient in law if facts are pleaded and proved to such an extent as justifies a suspicion. [Lord CAMPBELL, C. J.—It is impossible to enunciate as a distinct proposition what is or is not probable cause; which has made me doubt, or at least regret, probable cause being matter of law.]

Prideaux, contra.—It may be admitted that every case of this kind must stand on its own grounds: but the defendant has to show actual causes of suspicion which would justify arresting the plaintiff, keeping him in custody, and subjecting him to examination; and of those causes the Court will judge, as was done in *Mure v. Kaye*, 4 Taunt. 34. Wherever the justification has been held sufficient, some facts have been shown, tending to implicate the plaintiff, and not a mere belief, as in the present plea. Facts of this kind were set forth and proved in *West v. Baxendale*: and the distinction was there pointed out in argument (with respect to a piece of evidence rejected by the Judge), between facts which show probable cause, and facts which only show bona fides in the defendant. His belief may be material to the question of bona fides, but not to that of probable cause. A *belief is alleged in the present case, but no facts beyond it to which the Court can ascribe any weight. [*384 "The key of the said desk" is not stated to have been that with which the desk was opened. [Lord CAMPBELL, C. J.—May not we intend so after verdict?] It is not alleged that in fact no person but the plaintiff had access to the key. There is no ground for saying that the captain of a ship acts, in a case like this, with the authority of a magistrate. As to putting the plaintiff in irons, "the same being a reasonable mode of detainer" is not a justification in fact, but only the expression of an opinion. [WIGHTMAN, J.—The jury have found that it was a reasonable mode.] The question was not raised in the form of an issue of fact. In *Wright v. Court*, 4 B. & C. 596 (E. C. L. R. vol. 10), the defendants were charged with falsely imprisoning the plaintiff and handcuffing him; and their plea was, that "they handcuffed plaintiff" "in order to prevent his escape, and took him so handcuffed before a justice, to be then and there interrogated," &c.: but the Court held this insufficient, saying:, 'The defendants have also justified handcuffing the plaintiff in order to prevent his escape, but they do not aver that it was necessary for that purpose, or that he had attempted to escape.' There

is no distinction on this point between arrests at sea and on shore. Suspicion of felony does not justify putting in irons: specific grounds of fact ought to be shown. *Seymour v. Maddox*, 16 Q. B. 326 (E. C. L. R. vol. 71), bears an analogy to this case. There the declaration was in case for leaving an aperture in the floor of a theatre insufficiently fenced and lighted, whereby the plaintiff suffered injury: the declaration, *885] after stating certain facts, averred "that it then became *and was the duty of the defendant" to cause the said floor to be lighted, &c.: and the Court held, on motion in arrest of judgment, that the count was insufficient, for that the facts set forth did not show any legal duty, and that the allegation of duty could not aid, for that the declaration must stand or fall by the facts stated. The question of duty, as, here, the question of belief, was not one upon which the jury had means of deciding.

Keating, in reply.—The substantive complaint in this case is the coercion, generally; if the plaintiff meant to contend that the coercion by putting in irons was excessive, he should have new assigned. The plea alleges it to have been a reasonable mode of detainer. In *Wright v. Court*, 4 B. & C. 596 (E. C. L. R. vol. 10), the defendants pleaded, as their justification of handcuffing plaintiff, that it was "to prevent his" escape: and the objection, on demurrer, was, that the averment made it necessary to show that an attempt to escape was made, or might have been expected but for the handcuffing.

Lord CAMPBELL, C. J.—I think this plea is sufficient, and would have been so on demurrer. The defendant, in a case of this kind, must show reasonable grounds of suspicion for the satisfaction of the Court; it is not enough to state that he himself reasonably suspected. But he is not bound to set forth all the evidence; it is enough if he shows facts which would create a reasonable suspicion in the mind of a reasonable man. Now the facts stated here are that the plaintiff was the defendant's servant, and, as such, had access to his cabin, and had the charge *886] of his goods and chattels there; that, *on two occasions just before the times when, &c., moneys had been feloniously stolen from the defendant's possession, out of a desk then being in his said cabin; that upon each occasion the desk had been clandestinely opened by means of a key; and that the plaintiff had access to and could have obtained the key of the said desk and unlocked the same and taken away the said moneys, and defendant believed that no other person had or could have obtained access to the key of the said desk without plaintiff's knowledge: wherefore the defendant, having probable cause of suspicion, and suspecting the plaintiff for, amongst other things, the causes aforesaid, to have been guilty of the stealing, did, as he lawfully might, &c. Was there not, under these circumstances, sufficient ground for suspecting that the plaintiff had committed the felony? The plaintiff is alleged to have had access to "the key" of the desk. The argu-

ment on his side, insisting upon facts to support the justification, would almost go to the length of asserting that the plea would have been insufficient if it had alleged that no one but the plaintiff had access to the key. But can there be any doubt that the statement, as made, goes far enough? Consistently with the pleas another person might have had access to the key; but it might have been under circumstances not raising the remotest suspicion. I agree with Mr. *Prideaux* that the mere belief of the defendant is not sufficient; but, in addition to that, here are facts which show that a reasonable man might have believed as he did. As to the putting in irons, it is justified as a reasonable mode of detainer: and, after verdict, we must take that to have been proved. There is something frightful in the idea of being put in irons: but it is only a mode of detention; *and, if it was excessive, the plaintiff should have been assigned. [*387]

WIGHTMAN, J.—After verdict we need not consider some objections which might have been made to this plea on special demurrer. The jury have found that the defendant did believe that no person but the plaintiff could have had access to the key of the desk without his knowledge. Then look at the other circumstances on the record, adding that fact. The plaintiff had charge of the defendant's effects; the defendant had twice lost money shortly before the committing of the alleged trespasses: the plaintiff had access to the key of the desk from which the money was taken: and it may well be inferred from the statements that the key which the plaintiff had access to was the key with which the desk was opened. Sufficient ground, then, in fact, is stated for the suspicion. As to the putting in irons, the jury have found it to be a reasonable mode of detainer; and there is nothing before us to show the contrary.

ERLE, J.—It appears sufficiently on the plea that the felony was committed by means of an instrument, and that the plaintiff had access to that instrument, and the defendant believed that he alone had such access. We need not consider to what extent, in a case of this kind, facts as well as suspicion must be shown; here the facts are clearly sufficient. Suppose it appeared that the defendant had been robbed by a particular individual: that he had seen that individual, and that afterwards, seeing the plaintiff, he believed him to be the man. I cannot think that that would not be a sufficient *justification. On the point [*388] as to putting in irons, I agree in what has been already said.

CROMPTON, J.—I have had some doubt whether the grounds averred here were not too slight; but I think they are sufficient. It clearly would not be enough to say "I believed the plaintiff to be guilty;" a belief which might rest upon report, or conjecture, or clairvoyance. Actual ground of belief must be shown. But here the defendant does show it, by alleging that, just before the time in question, the plaintiff had charge of the desk and access to the key. The grounds of fact are

rather slighter than in other cases which have been decided; but they are sufficient. As to the confinement in irons: it is enough, upon this record, if there were any possible circumstances under which it might be right to put any irons upon the plaintiff. Rule discharged.

The QUEEN v. The Inhabitants of SLAWSTONE. *April 24.*

Under stat. 11 & 12 Vict. c. 31, s. 9, which provides that a period of fourteen days after "the sending" a copy of the depositions on which an order of removal is made, shall be allowed for "the giving" notice of appeal, such notice, if sent by post under stat. 14 & 15 Vict. c. 103, s. 10, is to be considered as given on the day on which, by the ordinary course of post, it ought to have reached the party to whom it is sent, though in fact it arrive by the post on a later day.

ON appeal against an order of two justices for the removal of Thomas Ward, his wife and children, from the parish of Slawstone, in the county of Leicester, *to the parish of Leverington Parson Drove, in the
*389] county of Cambridge, the Sessions quashed the order, subject to the opinion of this Court upon the following case.

The order of removal was made at Market Harborough, Leicestershire, on 5th August, 1851; and, on the 7th of the same month, notice of chargeability, and a copy of the order of removal, together with a statement of the grounds of removal, were sent by post from Market Harborough to the appellant parish. The solicitors for the appellant parish applied by letter, posted at Wisbeach on 26th August, to the clerk of the justices by whom the order had been made, for a copy of the depositions, which was sent to them in a letter posted at Market Harborough on 3d September, and received by the appellants' solicitors on 5th September.

On 17th September the solicitors for the appellant parish posted a letter at Wisbeach, containing a notice of appeal, which, in the regular course of post, ought to have arrived at Market Harborough, the post town for the respondent parish, on the 19th. On that day the pauper and his family were removed to the appellant parish. It appeared that the letter in fact reached Market Harborough upon the 20th.

On these facts it was contended, for the respondents, that the appeal should be disallowed, as the notice thereof had not been given within the prescribed time. The Sessions allowed the appeal and quashed the order.

If the Court of Queen's Bench should decide that the notice of appeal was given in due time, the order was to be quashed; if otherwise, the order to be confirmed.

*390] *Pashley*, in support of the order of Sessions.—The *notice of appeal was given in time. Stat. 11 & 12 Vict. c. 31, s. 9, pro-

vides that a "period of fourteen days after the *sending* of" the copy of the depositions "shall be allowed for the giving of such notice of appeal." Now, if by "the sending" is meant the putting the copy into the post, then by "the giving" of the notice of appeal must be meant the putting such notice into the post. In that case the notice, which was posted on the 17th September, was given within fourteen days of the sending of the copy of the depositions, which was posted on the 3d. If, on the other hand, the fourteen days are to be calculated from the day when the copy of the depositions was received by the appellants, namely, 5th July, then, as according to the ordinary course of post the respondents would have received the notice on the 19th, which would be fourteen days after, the notice must still be held to have been given by the prescribed time. Whichever mode of calculation be adopted, the same terminus a quo must be given as regards the sending both of the copy of the depositions and the notice of appeal. [COLERIDGE, J.—Suppose the notice had been put in the post, and never arrived at all.] In *Bishop v. Helps*, 2 Com. B. 45 (E. C. L. R. vol. 42), it was held that, under the Registration Act, 6 & 7 Vict. c. 18, the posting of a notice of objection, in sufficient time for it to arrive, in the ordinary course of post, by a particular day, as required by sect. 100, was a sufficient service of such notice on that day; and that the fact of delivery of the notice within the proper time was not essential. In *Stocken v. Collin*, 7 M. & W. 515,† and *Woodcock v. Houldsworth*, 16 M. & W. 124,† the same principle was adopted with respect to notice of the dishonour of a bill *of exchange. And in *Dunlop v. Hig-* [*391
gins, 1 H. Lords Ca. 381, it was held that a contract is suffi-
ciently accepted by the posting of a letter declaring acceptance of it.

Maunsell and O'Brien, *contrà*.—The words "giving of such notice of appeal" in stat. 11 & 12 Vict. c. 31, s. 9, clearly mean the actual apprising of the respondents by the appellants that they intend to appeal, not merely the preliminary steps taken by the appellants for the purpose of such apprising. Notices and grounds of appeal could not be sent by post until the passing of stat. 14 & 15 Vict. c. 105, sect. 10 of which provides that "it shall be lawful and sufficient to send any notice of appeal against an order of removal, or statement of grounds of appeal against such order, by post or otherwise, in like manner as a copy of an order of removal and statement of grounds of removal may now be sent by law."(a) This section merely allows the substitution of the post for a special messenger: and, if a special messenger had taken more than the usual time in delivering the notice of appeal, it could not have been held that the notice was given at the time when it ought properly to have been delivered. [Lord CAMPBELL, C. J.—The sender in such a case takes for granted the punctuality of the messenger: we must suppose the Legislature to take for granted the punctuality of the

(a) See stat. 4 & 5 W. 4, c. 76, s. 79.

post.] The point of time from which the fourteen days are to be reckoned is the "sending" of the copy of the depositions; that is, the posting it. If the parties sending it do not receive a notice of appeal within fourteen days after such sending, they are entitled to remove the pauper. The language of the statute is different with respect to the *copy of depositions and the notice of appeal; in the former *392] case it speaks merely of "sending," that is, posting or putting into the hands of a messenger; in the latter case it uses the word "giving," which implies not only sending but delivering. Bishop v. Helps, 2 Com. B. 45 (E. C. L. R. vol. 42), turned upon the language of a particular statute. By that Act, 6 & 7 Vict. c. 18, s. 100, it is specially provided that the production, by the party posting a notice of objection to a voter, of the duplicate stamped and given back to him by the postmaster at the time of such posting, shall be evidence of the notice having been given to the voter on the day on which, by ordinary course of post, it would have reached him: and the chief question in the case was, whether a notice to the overseers, under sect. 101, came within the same rule. Stat. 14 & 15 Vict. c. 105, contains no such special provision. Stocken v. Collin, 7 M. & W. 515,† Woodcock v. Houldsworth, 16 M. & W. 124,† and Dunlop v. Higgins, 1 H. Lords Ca. 381, are not in point; they are all cases of mercantile transactions, where there is mutuality, which does not exist here.

Lord CAMPBELL, C. J.—It seems to me that there is no difficulty in construing stat. 11 & 12 Vict. c. 31, s. 9. The effect of that section is that a notice of appeal must be held to be given at the time when, according to the ordinary course of post (if it be sent by post, under stat. 14 & 15 Vict. c. 105, s. 10), it would reach the party to whom it is sent. The notice in the present case, therefore, was given within the proper time. The same interpretation must apply to the word "sending," with respect to the copy of the depositions. Even if that word *393] be held to mean the *mere posting, the rule must be reciprocal; and in that case, also, the notice will have been given in proper time. I am, however, clearly of opinion that the construction which I have first suggested is correct.

COLERIDGE, J.—I am of the same opinion. The construction which we give to the statute carries out the intention of the Legislature, which was that appellants, after receiving a copy of the depositions, should have fourteen days to consider whether they would appeal or not. If they choose, as stat. 14 & 15 Vict. c. 105, s. 10, allows them, to send their notices by a public messenger instead of a private one, they are not responsible for the delay of the former, though they would be for that of the latter.

WIGHTMAN, J., concurred.

(CROMPTON, J., had left the Court.)

Order of Sessions confirmed.

The QUEEN against EDMUND WILLIAMS. *April 24.*

An order, made by two justices under the Tithe Commutation Act, 5 & 6 Vict. c. 54, s. 16, for payment, by way of contribution, of a proportion of rent-charge on a close, after stating that complaint on oath had been made before one of the said justices, of the several matters giving them jurisdiction to make the order, proceeded as follows: "And now at this day the said" (complainant and the party summoned) "appear before us the undersigned justices, and we, (a) having examined into the merits of the said complaint, do, in pursuance of the statute in that case made and provided, determine that the just proportion," &c., "to be contributed by E. W." (on whom the order was made) "in respect of the said close" is, &c. The order then declared the amount of the proportion payable, and ordered payment.

Held, that the order, upon the face of it, was insufficient, inasmuch as it did not show any adjudication, express or implied, of the truth of the matters of complaint.

PASHLEY, in last Hilary Term, obtained a rule nisi to quash an order made by two justices for the *county of Denbigh, dated 23d July, 1851, as to the first proportion of a certain tithe rent [*394 charge to be contributed by the Reverend Edmund Williams in respect of a certain close called Erw Wen, and an order and direction of the said justices to the said E. Williams to pay to one Edward Hilditch, 1*l.* 1*s.* in respect of the said close, and 6*l.* 18*s.* 6*d.* for costs.

The order was as follows.

"County of Denbigh } Be it remembered that," on 16th July, 1851, at
to wit. } Denbigh, in the said county, complaint on oath
was made before John Williams, &c. (a justice for the said county), by
Edward Hilditch, of Penywaen, in the parish of Llandyrnog, in the
county of Denbigh, farmer, that the farm yard, house, buildings, and
land called Penywaen, situate in the said parish of Llandernog, num-
bered consecutively 145—160 in the apportionment of the tithes of the
said parish, was charged with an amount of rent-charge, namely 13*l.*
10*s.* 4*d.* per annum, and that such land belonged to two landowners in
several portions, that is to say, the said farm house, buildings, and land
numbered 145—159 belonged to John Edward Madocks, Esquire, and
the field, piece, or parcel of land, called Erw Wen, and numbered 160
in the said tithe apportionment, belonged to the Reverend Edmund
Williams, of Pentre Mawr, in the said parish of Llandernog, and that
the said E. Hilditch was tenant to the said J. E. Madocks for the said
farm and land except number 160; and that he had paid to the proprie-
tor of the said parish, and as such owner of the said apportioned tithe,
the whole amount of such rent-charge for the years 1849 and 1850, and,
in pursuance of the statute in that case made, &c., *he had, by [*395
a certain notice or instrument in writing, under his hand, and
dated 5th July instant, and which had been duly served, &c., demanded
from the said E. Williams contribution towards such tithe rent-charge
for the said several years, in respect of the said field, &c., called Erw
Wen, and numbered 160, the annual payment in lieu of tithes for which

(a) "Now," in the order; but the Court treated this as a clerical error for "we."

forms part of the said aggregate annual sum of 13*l.* 10*s.* 4*d.*, and which, in the calculation of the valuer and apportioner employed to apportion the said tithes, was estimated at 11*s.* per annum; and that, although the said E. Williams had been served with the said notice, he had neglected to make such contribution to the said complainant E. Hilditch; and that the said John Williams then issued his summons, &c. (reciting summons to Edmund Williams to appear before two or more justices for the county of Denbigh, in order that they might examine into the complaint, and determine the proportion of the rent-charge to be contributed by E. Williams as the owner of the said close). "And now at this day the said E. Hilditch and E. Williams, the parties aforesaid, appear before us the undersigned justices; and *now*, having examined into the merits of the said complaint, do in pursuance of the statute in that case made and provided, determine that the just proportion so paid by the said E. Hilditch of the said rent-charge to be contributed by the said E. Williams in respect of the said close called Erw Wen, and numbered 160, to be at the rate of 10*s.* 6*d.* per annum. And we do order and direct the said E. Williams to pay to the said E. Hilditch the sum of 1*l.* 1*s.*, being the amount paid by the said E. Hilditch, in respect of the said close called Erw Wen, two years ending the first *396] day of January last past; and *also to pay to the said E. Hilditch the sum of 6*l.* 18*s.* 6*d.* for his costs in this behalf, within ten days after service of this order upon the said E. Williams; and, in default of payment of the said several sums to the said E. Hilditch, we hereby further adjudge and order that the same be levied by distress upon the field, piece or parcel of land, called Erw Wen, being the land liable to the payment thereof." "Given under our hands and seals this 23d day of July, A. D. 1851, at Denbigh, in the said county.

JOHN HEATON.

JOHN WILLIAMS."

The points relied on in support of the rule were, that the order was defective on the face of it, and contained no sufficient allegation of facts showing jurisdiction in the justices; that it contained no adjudication whatever; that the determination of the just proportion to be contributed could not legally be made by the parties alleged in the order to have made the same; and that the order, in the ordering part thereof, did not pursue the statute in that behalf.

Welsby now showed cause.—The order is good. It is said to contain no adjudication as to the truth of the matters stated upon complaint. But the order recites that the justices have "examined into the merits of the said complaint:" that recital, coupled with the subsequent order, amounts to an adjudication that the matters stated upon complaint are true; and it is in accordance with sect. 16 of stat. 5 & 6 Vict. c. 54, under which the order is made, and which enacts that the justices, upon complaint made, "shall examine into the merits of the complaint, and

determine *the just proportion of the rent-charge" "which ought to be contributed." [*397]

Pashley, *contra*.—First, there is, on the face of the order, no adjudication at all by the justices. From the language of the order itself, it would appear that the adjudication was made by the complainant and the party summoned. [WIGHTMAN, J.—That is a mere clerical error; "now" has been written instead of "we."] Next, there is no adjudication as to the truth of the facts stated upon complaint. Such adjudication, at the most, appears only by implication; and that is not sufficient; the truth of the facts must be expressly adjudicated on in the order; *Rex v. Pitts*, 2 Doug. 662.(a) In that case the order was an order of bastardy, made by two justices under stat. 18 Eliz. c. 3, s. 2, which does not expressly prescribe an adjudication on the facts, as stat. 5 & 6 Vict. c. 54, s. 16, does. In the present case, therefore, such adjudication is still more requisite to the validity of the order. [COLERIDGE, J.—The proportion of rent-charge to be contributed is expressly found; and so is the fact that such proportion had for two years been paid by the complainant.] The order does not even decide that Williams is the owner of the close. It declares that he is to pay "in respect of the said close;" but that is not a sufficient adjudication of ownership.

WIGHTMAN, J.(b)—I think the objection to this order is well founded. For anything that appears upon the face of the order, the justices may have taken for granted the truth of all the matters of complaint, and have *determined the proportion of rent-charge without further inquiry. There is no doubt that they ought to have adjudicated [*398] as to the truth of the facts stated upon complaint: the only question is, whether they have so adjudicated by implication. But to hold that they have, would be going farther than we are warranted in going by any case up to the present time. "Having examined into the merits of the said complaint" may mean nothing more than, having heard what the respective parties had to say, upon the assumption that the matters of complaint were true. I think, therefore, that the order, on the face of it, is insufficient.

CROMPTON, J., concurred.

COLERIDGE, J.—I did not hear the whole of the argument; but, upon what I have heard, I am of the same opinion. Rule absolute.

(a) See *Regina v. Lewis*, 8 A. & E. 881 (E. C. L. R. vol. 35).

(b) Lord Campbell, C. J., was absent.

SLATER, Appellant, and The Mayor, Aldermen, and Burgesses of ASHTON UNDER LYNE, BROMLEY, WALKER, and WOOLLEY, Respondents. April 28.

Before the passing of the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, the borough of A. was divided into a town and a country district, each maintaining its own highways. That Act was incorporated in stat. 12 & 13 Vict. c. xxxv. (for the improvement of the borough of A.), except so far as anything in the former Act was varied or otherwise provided for by this. By the latter Act, sects. 20, 24, the mayor, aldermen, and burgesses of A. were empowered to cause any street in the borough of A. to be sewered and paved, at the expense of the adjoining landowners, and certify the same, when completed, to be a public highway: and sect. 25 enacted that it should be lawful for them from time to time to make a rate for the maintenance of such highways upon the occupiers of all houses, &c., and lands "within the said borough." Stat. 10 & 11 Vict. c. 34, s. 48, enacts that the Commissioners (that is the persons or body corporate intrusted to execute any local improvement Act incorporated with this) shall be the surveyors of all highways within the limits of such local Act, and shall have, within those limits, all the powers of surveyors; and that the inhabitants of the district within those limits shall not be liable to highway rate in respect of roads within other parts of the parish, &c., in which the said district is situate. By sect. 49, the Commissioners are to be indictable for non-repair of any public highway within the limits of such local Act, in the same manner as the inhabitants thereof or of any parish, &c., or other district therein were liable before the passing of such Act.

Held that the mayor, aldermen, and burgesses of A. were bound, as Commissioners under the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, to rate the whole borough for the repair of highways paved and certified under sects. 20, 24, of the local Act, and likewise to rate the whole for repair of the public highways not so paved and certified. And that a rate upon the country district alone, for repair of the highways within it (not paved or certified), was bad.

ON notice of appeal against the after-mentioned rate, a case was stated for the opinion of this Court by consent and order of a Judge.

*399] "The rate, made and published in May, 1851, was intituled "An assessment to a highway rate of 7d. in the pound for the Old Town division of the borough of Ashton under Lyne by virtue of the 5 & 6 W. 4, c. 50, made by the town council of the borough of Ashton under Lyne as surveyors under The Towns Improvement Clauses Act, 1847, and The Ashton under Lyne Improvement Act, 1849." By this rate the appellant, Edward Slater, was assessed in the sums of 1s. 10d. and 9s. 4d., as the occupier of a shop and occupier and owner of a cottage, valued, &c.

The other material facts appearing by the case were as follows.

The parish of Ashton under Lyne, in the county of Lancaster, consists of four divisions, called respectively The Ashton Towns division, The Audenshaw division, The Hartshead division, and The Knott Lanes division. Of these the Ashton Towns division is again subdivided into two districts or subdivisions, The Old Town and The Demesne. The municipal borough of Ashton under Lyne consists of the Ashton Towns division of the said parish (including the said two districts or subdivisions), and of part of the Audenshaw division. Up to the time of the passing and coming into operation of The Ashton *under Lyne
*400] Improvement Act, 1849, the said Audenshaw, Hartshead, and Knott Lanes divisions maintained each separately its own highways,

and had each separate surveyors; and the said Old Town and Demesne districts of the said Ashton Towns division maintained each separately its own highways, and had each separate surveyors.

The greater portion of the Old Town district of the borough of Ashton under Lyne is a country district. The Demesne district is nearly altogether covered by the town, and comprises a great quantity of houses and other rateable property.

After the passing of the Ashton under Lyne Improvement Act, the mayor, aldermen, and burgesses required the surveyors of the Old Town and Demesne divisions respectively to hand over to them all books and papers in their power and custody as such respective surveyors: and the surveyors delivered the same accordingly.

Long before and at the time of the passing of the Ashton Improvement Act, and up to and at the time of the making and publishing of the rate now appealed against, there were, and still are, many public and common highways both in the Old Town division of the borough and in the Demesne division. Some of the highways within each division had been, before the making and laying of the rate, sewered, drained, levelled, flagged, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses, and were, after the passing of the Ashton Improvement Act and before the laying of the rate appealed against, declared to be so sewered, drained, &c., to such satisfaction, and had been declared to be public highways, and have been kept in repair out of moneys levied under and by virtue of the 25th section of the last-mentioned Act by the rates of February and December, [*401 1850, hereafter mentioned. Others of the highways within the said Old Town and Demesne divisions have never yet been sewered, &c., paved and otherwise completed to the satisfaction of the said mayor, &c., and have never yet been certified or declared to be sewered, &c., nor declared to be public highways within the meaning of the said Improvement Act.

In May, 1851, and after the passing of the last-mentioned Act, certain highways in the Old Town division, which were not at that time sewered, &c., to the satisfaction, &c., being then out of repair, the said mayor, aldermen, and burgesses, assuming to be and acting as surveyors of the said Old Town division, assessed and laid the rate in question upon the rateable property in the said Old Town division for the repair only of such highways within that division as had not at the time of the assessing and levying of such rate been so sewered, drained, levelled, paved, flagged, and otherwise completed; and at the same time, assuming to be and acting as surveyors of the Demesne division, they assessed and laid another rate upon the rateable property within the Demesne division for the repair of highways within that division exclusively, namely for the repair only of such highways then out of repair within that division as had not been at the time of the assessing and levying

of the said rate sewered, drained, &c., to such satisfaction as afore-said.

The said respective rates are laid upon the rateable property within the said respective districts to the exclusion of all other rateable property within the said borough, but not within the said respective districts.

*402] The respondents Bromley, Walker, and Woolley are *respectively persons who occupy rateable property within the said borough but not within the Old Town district or subdivision thereof, and who ought to be included in any rate made for the repair of highways and laid upon the said borough at large, but who ought not to be included in rates, if any, which can be legally assessed and laid upon the said Old Town district or subdivision exclusively of the rest of the borough.

There is within the Old Town district land used as arable land only, land used as meadow land only, and land used as pasture ground only. The occupiers of these lands respectively are rated in and by the said rate according to the full net annual value of such respective lands; and this appears on the face of the said rate.

In February, 1850, the mayor, aldermen, and burgesses laid a highway rate of 2d. in the pound on all rateable property within the said borough, under the authority of the Ashton Improvement Act. The rate was headed: "Borough of Ashton under Lyne in the county of Lancaster. A certain pound rate of 2d. in the pound for raising money for answering and defraying the expenses of carrying into execution the purposes of an Act of parliament made and passed in the 12th and 13th years of the reign of her present Majesty Queen Victoria, intituled," &c. (Ashton Improvement Act), "and called The Highway rate, made and levied upon the occupiers of all messuages, houses," &c. (according to the enumeration in sect. 25 of the Act; p. 407, post), "lands, tenements, and hereditaments whatsoever, situate, standing, and being within the said borough, according to the full net annual value of the same respectively. Dated the 13th day of February, 1850." This rate was collected early in 1850, and expended in the repair of
*403] *the highways throughout the whole borough, whether declared as such or not?

In December, 1850, the mayor, aldermen, and burgesses laid another rate of 1d. in the pound, under the authority of the Ashton Improvement Act, which rate was headed: "An assessment to the highway rate for the borough of Ashton under Lyne, made this 11th day of December, A. D. 1850, after the rate of 1d. in the pound, by virtue of the Ashton under Lyne Improvement Act, 1849." This rate was laid on all the property within the whole borough, and expended in the repair of those highways only which had been declared as such under the Improvement Act, and which had been paved, sewered, &c., to the satisfaction of the corporation.

The Ashton Improvement Act applies to the same district as that comprised within the municipal borough of Ashton under Lyne, the limits of both being co-extensive. The Old Town division mentioned in the heading of the rate appealed against, is the same with the Old Town district or subdivision mentioned in this case. The mayor, aldermen, and burgesses of the said borough of Ashton under Lyne are the Commissioners intrusted by the Improvement Act with powers for executing the purposes thereof; and they have no revenues, moneys, or other means applicable to the repair of any highways within the said borough, except such moneys as they may be entitled to raise by rates under the several statutes in that behalf.

The question for the opinion of this Court was: Whether the mayor, aldermen, and burgesses, in May, 1851, under the Ashton under Lyne Improvement Act, 1849, and the Acts incorporated therewith, and the 5 & 6 W. 4, c. 50, or any or either of these Acts, or *any other [*404 statute then in force, were entitled to assess and levy the said rate upon the rateable property within the Old Town division exclusively for the repair of such of the highways within that division as had not been at the time of the assessing and laying of that rate declared to be, and were not, sewered, drained, levelled, flagged, paved, and otherwise completed. If the Court should be of opinion that they were so entitled, this rate was to be confirmed: if the Court should be of the contrary opinion, it was to be quashed: judgment to be entered on motion by either party at Quarter Sessions (as specified in the case) in conformity with the decision of this Court, and for such costs, if any, as this Court should adjudge (the Court to have full power of adjudicating upon the costs of the appeal and case): and the rate to be amendable if, and as, this Court should direct.

The sections of the Towns Improvement and Ashton under Lyne Improvement Acts chiefly observed upon in the argument were the following.

Stat. 10 & 11 Vict. c. 84 (Towns Improvement Act), enacts:

Sect. 2. That, in this Act, "the expression 'The Commissioners' shall mean the Commissioners, trustees, or other persons or body corporate intrusted by the special Act with powers for executing the purposes thereof." And that The special Act "shall be construed to mean any Act which shall be hereafter passed for the improvement or regulation of any town or district, or of any class of towns or districts defined or comprised therein, and with which this Act shall be incorporated."

Sect. 3. That "the word 'Street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act."

Sects. 47 to 56 are headed: "And with respect to paving and maintaining the streets, be it enacted as follows."

Sect. 47. "The management of all the streets which at the passing of the special Act are or which thereafter become public highways, and the *pavements and other materials, well as in the foot-ways as carriage-ways, of such streets, [*405 and all buildings, materials, implements, and other things provided for the purposes of the said highways, by the surveyors of highways or by the Commissioners, shall belong to the Commissioners."

Sect. 48. "The Commissioners, and none other, shall be the surveyors of all highways within the limits of the special Act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force; and the inhabitants of the district within the said limits shall not, in respect of any lands situate within the said district, be liable to the payment of any highway rate, grand jury cess, or other payment in respect of making and repairing roads within the other parts of the parish, township, barony, or place in which the said district or any part thereof is situate."

Sect. 49. "The Commissioners shall be deemed guilty of a misdemeanour for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanour in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act."

Sect. 167. "Every rate which the Commissioners are by this or the special Act authorized to make or levy shall be made and levied by them at yearly, half-yearly, or such other periods as they think fit, upon every person who occupies any of the prescribed kinds of property, or (if no property be prescribed) any house, shop, warehouse, counting-house, coach-house, stable, cellar, vault, building, workshop, manufactory, garden, land, or tenement whatsoever (except as hereinafter is excepted), within the limits of the special Act, or of the district where such rate is assessed on the occupiers of lands and buildings of a separate district as hereinbefore provided, according to the full net annual value thereof respectively; and the said rates shall be vested in the Commissioners, and shall be payable at such times as they appoint." Proviso, as to the proportion in which certain descriptions of land shall be rated.

Sect. 199. "The several persons who at the time of the passing of the special Act are surveyors of highways for any township, or other district within the limits of the special Act, may proceed for the recovery of any highway rate made in such township or district, and then remaining unpaid, in the same manner as they might have done if this and the special Act had not been passed, and they shall apply the money which so recover, in the first place, in reimbursing themselves any expenses which they have incurred as such surveyors as aforesaid, and in discharge of any debts legally owing from them in respect of the highways within such township or district; and the surplus, if any, arising from any buildings or lands within the limits of the special Act, or a proportionate part thereof, shall be paid by them to the treasurer to the Commissioners, and shall be applied to the same purposes *as the rates by this or the special Act authorized to be levied are directed to be applied."

Stat. 12 & 13 Vict. c. xxxv., local and personal, public (Ashton under Lyne Improvement Act), enacts :

Sect. 13. "That the Towns Improvement Clauses Act, 1847, the Town Police Clauses Act, 1847, and the Markets and Fairs Clauses Act, 1847, shall, except in so far as herein varied or otherwise provided for, be incorporated with and form part of this Act."

Sect. 20. "That if any street or part of a street, whether the same be a public highway or not, and whether the same be already or shall at any time hereafter be laid out and opened to the public within the said borough, be not or shall not be sufficiently sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses, it shall be lawful for the mayor, aldermen, and burgesses at any time, and from time to time after the passing of this Act, notwithstanding the provisions of the Towns Improvement Clauses Act, 1847, incorporated herewith, to order that any such street or part thereof shall be freed from obstruction, sewered, drained, levelled, flagged, paved, and

otherwise completed according to such plan, on such level, in such manner, of such materials, and within such time as they shall direct, and thereupon the respective owners of the buildings and lands lying alongside of or adjoining to such street or part of a street (notwithstanding any part of such street may include, pass over, lie opposite, or be adjacent to any cross or other street, or any part thereof) shall, according to such plan, on such level, of such materials, within such time, and in such manner as shall be expressed in such order, at their respective charges and expenses, remove all obstructions, and well and sufficiently sewer, drain, level, flag, pave, and otherwise complete such street, so far as the same extends, along their respective buildings or lands; and in the event of such owners or any of them making default in the due execution of such work within such time as aforesaid, the mayor, aldermen, and burgesses may cause such work to be executed, and may recover the expense incurred by them in respect thereof in the manner directed by the provisions of the Towns Improvement Clauses Act, 1847, with respect to insuring the execution of the works by that or the special Act required to be done by the owners or occupiers of houses or lands, so far as such provisions apply to the recovery of the expense of works required to be done by owners, and except in so far as such provisions authorize the recovery of such expense by drainage rates."

Sect. 24. "That when and so soon as any street already made or hereafter to be made within the said borough shall have been sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses, then and in each such case it *shall be lawful for the mayor, aldermen, and burgesses, and they are hereby required, to certify and declare the same [*407 to be a public highway, and after such certificate and declaration the same shall be a public highway; and the same, together with the main sewer under the same, shall be for ever afterwards repaired and repairable as such out of the highway rate hereinafter provided; and every such certificate and declaration shall be recorded in the books of the mayor, aldermen, and burgesses."

Sect. 25. "That for the purpose of maintaining and repairing the present highways within the borough when so sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction," &c., "as aforesaid, and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewers under the same, it shall be lawful for the mayor, aldermen, and burgesses, when and so often as they shall think necessary, to order and direct a rate or assessment, to be called the 'Highway Rate,' to be made and levied upon the occupiers of all messuages, houses, shops, workshops, offices, counting-houses, warehouses, cellars, vaults, manufactories, foundries, breweries, mills, stables, coach-houses, collieries, canals, railways, gas works, water works, buildings, erections, yards, gardens, curtilages, lands, tenements, and hereditaments whatsoever already built, erected, or situate, or which shall hereafter be built, erected, or situate, within the said borough, according to the full net annual value of the same respectively (excepting as hereinafter mentioned), anything contained herein or in any other Act to the contrary notwithstanding; provided" that such Highway rate shall not in any one year exceed 1s. in the pound upon such annual value.

Sect. 50. "That nothing herein contained shall be held to alter, diminish, or affect any of the powers, privileges, and authorities vested in the mayor, aldermen, and burgesses by or in pursuance of any of the Acts of parliament now in force, or which may be hereafter enacted in relation to municipal corporations, or by or in pursuance of the aforesaid charter of incorporation" (of the borough of Ashton under Lyne, granted in 1847, and referred to in sect. 1 of this Act); "and, except in so far as herein otherwise provided, the said powers, privileges, and authorities shall extend and apply to the objects and purposes of this Act, and may be exercised in the execution of or otherwise in relation to such purposes."(a)

(a) A few more clauses of both Acts were cited in argument, which it is not thought necessary to set forth at large.

Cowling, for the respondents.—The rate was rightly laid by the mayor, aldermen, and burgesses, as surveyors of highways, upon the Old Town division exclusively. Under stat. 10 and 11 Vict. c. 34, s. 2, which is *408] “incorporated with the Ashton Improvement Act, they, being the “body corporate intrusted by the special Act with powers for executing the purposes thereof,” have the authority which is vested in “Commissioners” by the first-mentioned Act. That authority, as to the matter now in question, is marked out by sects. 47, 48, 49, of stat. 10 & 11 Vict. c. 34. “The Commissioners, and none other,” are to be “surveyors of all highways within the limits of the special Act;” that is, not to exercise the jurisdiction of surveyors indiscriminately over the whole division which is comprised in stat. 12 and 13 Vict. c. xxxv., but to act in any district of that division as the surveyors of such district might have done before the Act of 10 & 11 Vict. passed. And the case states that, before the passing of the Ashton Improvement Act, the Old Town district maintained its highways separately, and had its own surveyors. By sect. 49 the Commissioners are indictable for non-repair of any public highway within the limits of the special Act, as the inhabitants thereof, “or of any parish, township, or other district therein,” would have been before the passing of the special Act. The words “or of any parish,” &c., would be inconsistent if the Commissioners were now surveyors for the entire division. The language of sects. 161, 162, and the provisions of sect. 199, are adverse to such a construction. And the Act makes no provision authorizing a general rate for the highways, or any such rate which might not before have been laid by the surveyors respectively. All the power of the Commissioners in this behalf is merely incidental to their character of surveyors. As to the local Act, 12 & 13 Vict. c. xxxv.: the provision of sect. 25 for levying a highway rate takes effect upon the entire division *409] within which highways are paved, *sewered, &c., to the satisfaction of the mayor, aldermen, and burgesses; but the highways of the rural district, which have not been paved, &c., continue to be repairable under the former highway law. The local Act does not introduce any obligation to pave and sewer the whole borough: it is discretionary; and the paving, &c., may, in any part, remain undone. Sect. 20 provides that, if “any street or part of a street” be not properly sewerred, flagged, &c., to the satisfaction of the mayor, aldermen, and burgesses, they may “at any time, and from time to time,” order it to be done; but nothing is said as to repair of ways which are not to be sewerred, flagged, &c. The others being expressly mentioned, the inference is that these were intended to be repaired as before. [ERLE, J.—Your argument is that all the divisions in which streets are paved must contribute to the paving, but that the rate for unpaved ways must be paid by that district only in which they lie: so that the inhabitants of that district are liable for both repairs; the rest of the division not.]

Hugh Hill, contra.—First, it may be a question whether the general power, given to Commissioners, of acting as surveyors, by the Towns Improvement Act, 10 & 11 Vict. c. 34, s. 48, is extended to the mayor, aldermen, and burgesses by the operation of stat. 12 & 13 Vict. c. xxxv., inasmuch as that Act, by sect. 13, incorporates the Towns Improvement Act "except in so far as herein varied or otherwise provided for." And, secondly, if they have that power as "Commissioners," whether the exercise of it with respect to streets (which, by sect. 3 of the former statute, mean "any road," &c., "and thoroughfare within the limits of the special Act") be *not a matter which is "varied" by stat. 12 & 13 Vict. c. xxxv. This last statute, sect. 20, gives them [*410 compulsory and discretionary powers with respect to streets not yet sewered, flagged, &c.; but with respect to any street which already was so at the passing of the Act, no discretion is allowed; if it is satisfactorily completed, the mayor, aldermen, and burgesses are "required" (sect. 24) to certify and declare the same to be a public highway; and the same shall then be a public highway and be for ever repairable out of the highway rate after mentioned. Then sect. 25 enacts that, for the purpose of maintaining "the present highways within the borough" when so sewered, flagged, &c., and "such of the present and future streets as shall from time to time be declared public highways as aforesaid," the mayor, aldermen, &c., may raise a rate, to be called "The Highway rate," to be levied upon the occupiers of all messuages, lands, &c., "within the said borough." The Legislature, when using these words, cannot have intended that one, or two, highway rates were to be levied according to circumstances. "The Highway rate" must comprehend all the highways within the limits of the special Act. [Lord CAMPBELL, C. J.—Can the ways referred to be repaired and maintained under this clause till it is certified that they are completed according to sect. 24; and does not this require that they shall be sewered, flagged, &c. ?] The repair might be according to the condition of the street; when it was sewered, the sewerage to be maintained; when paved, the paving. [WIGHTMAN, J.—The street is to be certified when it is sewered, flagged, &c., "and otherwise completed."] There is a clause (sect. 31) in stat. 12 & 13 Vict. c. xxxv., which gives the mayor, aldermen, and burgesses power to levy rates (called, in the margin of the clause, *"Improvement rates") on [*411 all messuages, lands, &c., within the borough "for carrying into execution the purposes of this Act, so far as not otherwise provided for herein or in the Acts incorporated herewith." If the cases suggested are not met by sect. 25, this clause may remove the difficulty. The rate now laid is not consistent with stat. 10 & 11 Vict. c. 34, s. 48. That makes the Commissioners surveyors, generally, of the district within the limits of the special Act, and gives them the power of surveyors within those limits, and over the inhabitants of that district. It

does not authorize separate rates upon the inhabitants of the several townships within the district. [Lord CAMPBELL, C. J.—Sect. 49 makes the Commissioners indictable for non-repair of any public highway within the limits, “in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act.”] That clause only points out the mode of prosecuting, and the kind of liability to which the Commissioners are subject. The words cited do not imply that the parish, township, or other district shall still be liable; but only that the liability which it formerly was under shall now attach to the Commissioners in respect of every part of the division. Sect. 50 forbids the trustees of any turnpike road within the limits of the special Act to collect toll on such road, or lay out money upon it. Sect. 199 directs the persons who are local surveyors at the time when the special Act passes to recover the highway rates for their respective districts, and, first applying the money to the discharge of their expenses and of debts due from them in respect of their highways, pay over the surplus to the treasurer of *412] the Commissioners, to be applied, generally, to the same *purposes as the rates which are to be levied under this or the special Act: the intention evidently being that the several funds shall be united into one for the limits within which the Commissioners officiate. Where special rates are contemplated for the future, express provisions are made, as in the case of private improvement expenses, sect. 156, and the cost of sewers, sects. 28, 29, 157.

Cowling, in reply.—Sect. 48 of stat. 10 & 11 Vict. c. 84, substitutes the Commissioners for the surveyors, but makes no change as to the parties who shall be rateable. “Within those limits” means within every part of them, respectively. If the Commissioners were indicted under sect. 49 for non-repair of highways, it could not be alleged that they were liable from time immemorial to repair the highways in the entire district. [Lord CAMPBELL, C. J.—The argument on the other side assumes that, since this statute, the custom in smaller districts is at an end. WIGHTMAN, J.—The provisions in sects. 161, 162, for making special rates, seem to imply that, except in those cases, one rate would be made for the whole division.] Those enactments may refer to rates made for particular purposes, as the sewer rate under sect. 158. Sect. 199 merely provides for a state of things in which the former system would be overridden, as to the persons who were to levy the rates.

Lord CAMPBELL, C. J.—I am of opinion that the rate cannot be supported: but I do not decide this on the ground taken by *Mr. Hill*, that the Commissioners can raise only one rate, to be applied both to the *413] rural and *to the urban ways. Sect. 25 of stat. 12 & 13 Vict. c. xxxv. does not bear that construction. The highway rate there mentioned is to be raised for maintaining the highways within

the borough "when so sewered, drained, levelled, flagged, paved, and otherwise completed" "as aforesaid;" not till then. It is to be a rate for the urban ways. Then, looking to the general as well as the special Act, we find that the Legislature provides for two general rates, each extending over the whole borough. One, as already mentioned, is for the urban ways, and to that the rural part of the borough is contributory; for the rate, under sect. 25, is upon the occupiers of "lands" generally. Then justice requires that the urban part should also contribute to the rural part; and that object is gained by sect. 48 of stat. 10 & 11 Vict. c. 84, which enacts that the Commissioners shall be the surveyors of all highways, and have all the powers of surveyors of highways, within the limits of the special Act, and that the inhabitants of the "district" within the said limits shall not, in respect of any lands within such district, be liable to highway rate for making and repairing roads within the other parts of the parish, &c., in which the district or any part thereof is situate. It seems to me that this gives the Commissioners power to rate the borough generally for the repair of rural roads within it, treating it as one district, though it may have consisted of separate ones before the Act passed. Mr. *Cowling* was not able to deny that, if part of such a district were brought within the borough and part not, the urban part of the borough would be rateable for repair of the portions of road in the part so brought in: yet no express power is given for this purpose. Sect. 49 supplies it, by providing that "the Commissioners shall be indictable for non-repair of any public highway within the limits of the special Act, "as [*414 the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act." It is unnecessary to go into the other clauses; all of them are reconcilable with the position that there are to be two rates, one for the urban and one for the rural part, and that all the property in the borough shall be contributory to both rates.

WIGHTMAN, J.—I am of opinion that this rate is bad, because laid for a part of the borough only. Taking all the provisions together, there are two rates, applicable to different descriptions of repairs: a rate for the street part of the highways, to which all the borough contributes, and a rate for the other highways: and, as the inhabitants of the rural part of the borough are bound to contribute to the repair of the streets, it is a just reciprocity that the other inhabitants of the borough should contribute to the repair of those highways which are not street. It would be a hardship if that were not so. Under sect. 48 of stat. 10 & 11 Vict. c. 84, the Commissioners have the powers of surveyors, generally; and among those is the power of laying a highway rate. If there is any difficulty in the case it arises from sect. 49; but that is to be explained in the manner pointed out by my Lord.

ELLIS, J.—The words used by the Legislature admit of the construc-

tion that the borough is to be one entire district: and an argument almost conclusive arises from the several enactments, that the Commissioners are bound *to make the whole contributory to both rates. *415] If it were otherwise, the rural part of the borough, after contributing to the repair of the urban ways, as it is bound to do, would have to repair its own without any contribution from the urban part. It is argued that sect. 49 contemplates a continuance of the former separation of districts: but that would be a great complication for no intelligible purpose. On the other construction no inconvenience arises; and it is greatly recommended by the consideration that it does away with all difficulty which there might be in stating the liability on an indictment.(a) Judgment for the appellant, with costs.

(a) Three Judges only were present.

TALLIS v. TALLIS. *April 29.*

Reported (on motion to set aside demurrer) 1 E. & B. 397, note (a) (E. C. L. R. vol. 72).

*416] *The QUEEN v. The Justices of SUFFOLK. *April 29.*

During the trial of an appeal against an order of removal, at the County Quarter Sessions, which was quashed with costs, F. S., one of the magistrates for the county, and a rated inhabitant of the appellant parish, sat on the bench, and on several occasions spoke to the chairman, and referred to documents put in evidence. The presence of F. S. being objected to, on the ground that he was an interested party, he admitted the fact; and the chairman stated that F. S. would take no part in the proceedings: but he remained in court till the decision of the appeal. No further objection was made. On motion for a certiorari, F. S. stated on affidavit, that, although he did speak to the chairman, and refer to documents, during the trial, he did not vote or give any opinion on the question before the court, or influence the decision of the other magistrates: and that, if the chairman and he had not believed that his presence on the bench, after his statement that he would not interfere, had been acquiesced in, he would have retired from the court during the trial.

Held, that his presence, under those circumstances, rendered the proceedings invalid.

The notice of application for a certiorari, under stat. 13 G. 2, c. 18, s. 5, was sworn to have been served on F. S. and another justice "who were present at the Sessions" "when the appeal mentioned in the said notice was heard, and were and are two of the justices" "by and before whom the order of Sessions mentioned in the said notice was made." The notice was signed by J. M., "attorney for the inhabitants of" the respondent parish.

Held: 1. That the service was sufficient, inasmuch as F. S., under the circumstances, must be considered as a member of the court, and one of the justices who made the order:

2. That the signature was sufficient.

O'MALLEY, in last Hilary Term, obtained a rule nisi for a certiorari to remove into this Court an order of the Ipswich Quarter Sessions quashing an order of two justices for the removal of William Garrard,

a pauper, and his wife and children, from Needham Market, in the parish of Barking, in Suffolk, to the parish of Haughley, in the same county.

The affidavits in support of the rule stated that, on the hearing of the appeal against the said order, several questions of law and fact were raised and discussed; and that eventually the appeal was allowed, and the order of removal quashed with costs. That, during the discussion of the said questions of law and fact, the Rev. Francis Steward, one of the justices for the county, sat on the bench next to the chairman, and took an active part during the arguments, and, upon five or six occasions, entered into conversation with the chairman, and referred him to the particulars of the documents *put in evidence, apparently in support of the argument for the appellants. That the [*417 said F. S. is rector of the parish of Barking cum Needham Market and Downsden (above mentioned), and was directly interested in the decision of the Court, inasmuch as there is only one poor-rate made for the whole of the said parish, and the said F. S. is rated therein as an occupier and owner. The affidavits further stated that the notice, required by stat. 13 G. 2, c. 18, s. 5, of the application for a certiorari was served on the said F. S. and on the Hon. and Rev. Frederick De Grey, who "were present at the Sessions" "when the appeal mentioned in the said notice was heard, and were and are two of her Majesty's justices of the peace in and for the said county, by and before whom the orders of Sessions mentioned in the said notice were made:" and that the notice was signed "John Marriott, attorney for the inhabitants of the said parish of Haughley."

The affidavits in answer, by the chairman, the said F. S., and other magistrates present at the hearing of the appeal, stated that, while the arguments upon the said objections were proceeding, counsel for the respondents observed to the Court that the said F. S., who was then sitting on the bench, was a rated inhabitant of the hamlet of Needham Market, (a) and, as such, ought not to take any part in the trial: that the chairman then inquired of the said F. S. whether he was such rated inhabitant; and that, he having replied in the affirmative, the chairman assented to the correctness of the counsel's observation, and further stated that the said F. S. would take no part in the hearing or decision of the appeal. That the chairman and the said F. S. believed counsel to have been satisfied with such statement, and that otherwise the said F. S. would have *withdrawn. That the decision of the Court [*418 on the several points was come to by the chairman and three other justices (the said F. S. not being one) without retiring, and without conferring with or being influenced by the said F. S., or by his presence, and without any vote or opinion being given by him. Mr. Steward, in his affidavit, stated that he probably did, during the trial of the

(a) *Viz.* to the rate of the parish of which the hamlet was part.

appeal, speak to the chairman, and refer to some papers lying before him; but that he abstained altogether from giving any opinion upon, or taking any part in the decision of, any question at issue, or having any conversation with the chairman or the other magistrates on the subject of the appeal.

Couch now showed cause.—First, the mere fact of Mr. Steward being a rate payer was not sufficient to disqualify him from taking a part in the discussion. In *Regina v. Justices of Hertfordshire*, 6 Q. B. 753 (E. C. L. R. vol. 51), which will probably be relied on by the other side, the magistrate was one of the justices who had made the order which was appealed against. [Lord CAMPBELL, C. J.—If a magistrate is, in any way, personally interested in the question before the Court, he ought not to take part in the proceedings.] Next, assuming that Mr. Steward had no right to interfere, there is nothing to show that he did take any part in the proceedings. He was certainly present: but he was present because the parties making the objection acquiesced in his remaining on the bench, after he had admitted that he was a rate payer. His mere presence was immaterial, unless he actually interfered in and influenced the decision, which he swears that he did not. [Lord CAMPBELL, C. J.—He *takes upon himself to say that he did not *419] influence the decision; but he admits that he spoke to the chairman and referred to documents. Surely that is an interference in the discussion.] That seems to have been before the objection was made. Further, the notice of the application for a certiorari is insufficient. It is sworn to have been served on Mr. Steward and another magistrate, “who were present at the Sessions” “when the appeal mentioned,” &c., “was heard, and were and are two of Her Majesty’s justices” “by and before whom the orders of Sessions mentioned in the said notice were made.” But in *Regina v. Justices of Herefordshire* (a) it was held that the order must be sworn to have been served on the justices by whom it was actually made; and, in *Regina v. St. James, Colchester*, 2 Lowndes, M. & P. 314, (b) the fact of the name of a justice appearing in the caption was deemed no evidence of his having been one of the justices making the order. In the present case it appears that the decision of the Court was arrived at by the chairman and three other magistrates, Mr. Steward taking no part in the proceedings. He certainly was present; but, if he did not interfere, the order cannot be said to be made by him, any more than if he had left the Court before the decision was made. [Lord CAMPBELL, C. J.—That would be a very different case.]

Lastly, the notice ought to specify the parties who apply for the writ of certiorari; *Regina v. How*, 11 A. & E. 159 (E. C. L. R. vol. 39). Here it is signed on behalf of “the inhabitants” of Haughley. The

(a) Note (a) to *Regina v. Darton*, 2 D. & L. 500.

(b) See S. C., 14 L. J. (N. S.) M. C. 203.

inhabitants, as a body, cannot appeal; *Regina v. Colbeck*, 12 A. & E. 161 (E. C. L. R. vol. 40). In *Regina v. St. James*, Colchester, the notice was signed by the attorney on behalf of a *particular inhabitant. In the present case no one would be liable for costs. [*420
[WIGHTMAN, J.—The attorney would be responsible.]

O'Malley and Power, *contra*, were stopped by the Court.

Lord CAMPBELL, C. J.—This rule must be made absolute. I am glad, for the sake of a pure administration of justice, that the application has been made. The proceedings in question are much to be censured. Mr. Steward, as a rated inhabitant of the appellant parish, was clearly interested in the appeal. If he had done his duty, he would have withdrawn from the Court during the hearing of the appeal. When I was Chancellor of the Duchy of Lancaster, I withdrew from the judicial committee of the Privy Council during the hearing of a case in which the interests of the Duchy were concerned.(a) A few days ago (b) my brother Crompton withdrew from the Court while a case was before it in which he had been engaged as counsel when at the bar. Mr. Steward, when his presence is objected to, declares that he will not interfere; so far, and so far only, there appears to have been an acquiescence in his remaining; but he afterwards does interfere, and remains until the appeal is decided, although he takes upon himself to declare that his presence and interference did not influence the decision. He did not vote; nor was there any voting; but he remained in Court, as a member of it; and therefore his presence vitiated the proceedings. With respect to the objection that the service of the notice was insufficient, I quite agree with the decision *of my brother Patteson in *Regina v. Justices of Herefordshire*;(c) but there the magistrate [*421 had not interfered in any way with the proceedings, and was in Court merely as a bystander. Mr. Steward remained on the bench till the appeal was decided; and he must therefore be held to be one of the justices by whom the order was made. The objection as to the signing of the notice has been already answered.

WIGHTMAN, J.—I am entirely of the same opinion. It is very important that no magistrate who is interested in the case before the Court should interfere, while it is being heard, in any way that may create a suspicion that the decision is influenced by his presence or interference. Mr. Steward's presence and interference was sufficient to create such a suspicion. As to the objections with respect to the notice, I also agree with my Lord Chief Justice.

CROMPTON, J.—The only question is, whether, during the hearing of this appeal, a magistrate who was interested interfered. Mr. Steward admits that he interfered, but states that, in his opinion, he did not in-

(a) *Dyke v. Walford*, 5 Moore's Pr. C. Ca. 434.

(b) See p. 297, note (a) ante.

(c) Note (a) to *Regina v. Darton*, 2 D. & L. 500.

fluence the decision. That is nothing to the point; if he interfered at all, that vitiates the proceedings.(a)

Rule absolute, without costs.(b)

(a) No fourth Judge was present.

(b) The above case was referred to on a subsequent day of the term, in

The QUEEN v. The Justices of LONDON. May 5.

The mere presence on the Bench of an interested magistrate during part of the hearing of an appeal is not sufficient ground for setting aside an order of Sessions made on such hearing, if it be expressly shown that he took no part in the hearing, came into Court for a different purpose, and did not in any way influence the decision.

ARTHUR MACNAMARA was convicted by Samuel Wilson, Esquire, an alderman of London, under stat. 5 & 6 Vict. c. 79 (see sect. 15), of having used a stage carriage, of which he was the proprietor, for the conveyance of passengers, having thereon words specifying that it *422] was constructed to carry thirteen passengers inside, whereas it was not truly constructed for carrying that number inside according to the regulations of the statute, and whereas the said carriage could not nor would contain, &c. (the defect was then specifically described). The conviction was confirmed, on appeal, at the Guildhall Sessions; and the defendant, in last Hilary Term, obtained a rule nisi to remove the conviction and order of Sessions into this Court for the purpose of their being quashed.

His affidavit in support of the rule stated that the information (according to his belief on grounds which he stated) was exhibited at the instigation of Mr. Wilson; that Mr. Wilson, on the hearing, took an active part against the deponent in several respects, which were mentioned; and that, on deponent's stating that he should appeal, Mr. Wilson gave orders to Mr. Pearson, the City solicitor, to prosecute and oppose the appeal, and Mr. Pearson did accordingly conduct the proceedings in support of the conviction for the said Alderman Wilson as respondent. That, at the Guildhall January Sessions, 1852, the carriage (an omnibus) was produced, on notice from Mr. Pearson, for the inspection of the justices. That, "for some time previously to and for some time after the said appeal came on to be heard and was heard, the said Alderman Wilson was sitting on the bench of magistrates at the said Sessions, and, part of the time during the hearing of the said appeal, was conversing with Mr. Alderman Finnis, another Alderman of the said City and one of the justices sitting on the said bench, and by whom the said appeal was, with other aldermen and justices, determined." That, in the course of the hearing, the justices left the bench to inspect the carriage, which was standing in the Guildhall yard; and that Alderman Wilson went into the carriage with them; and that, upon deponent and two coach builders going in also to explain the construction, Mr. Wilson ordered them out, and remained in the carriage for some minutes afterwards, in conversation with the justices. That he afterwards went with them into another omnibus, and then returned with them into the Guildhall, and sat on the bench with them, and in conversation with Alderman Finnis, for some time, and did not leave the Court till after several witnesses had been examined.

Alderman Wilson made affidavit in answer that, in consequence of a complaint made to him by a passenger, he directed an officer attending the Justice room, Guildhall, to examine Macnamara's omnibus, and, if the complaint appeared well founded, to get a summons issued. That the information was preferred in consequence, and a conviction obtained. That deponent sent the proceedings to the City solicitor in order that he might appear in support of the conviction in case of appeal, as is usual in cases where the public interests are concerned. That the Quarter Sessions at Guildhall were held on January 10th, at ten o'clock; and that a Petty Session was appointed for eleven on the same day, at which Alderman Wilson sat as justice. That he went into the Court of Quarter Sessions, *but withdrew before the appeal came on. That, on *423] his way to the Common Pleas Court, where the Petty Sessions were held, he saw the omnibus in the Guildhall yard, and persons collected round it; and that certain aldermen and the Recorder were then inside the omnibus. That Alderman Wilson said to Macnamara, who was keeping the door of the carriage, "I suppose Mr. Macnamara would not like me to get in;" to which he answered, "Oh yes I should, sir, pray get in," and assisted Alderman Wilson to enter the omnibus, and got in also himself: that other persons did the same, but were desired by one of the aldermen to withdraw, which they, and Macnamara also, did, but not by Wilson's desire. That Alderman Wilson, while in the omnibus (where he remained a few minutes), pointed out the seat complained of to the Recorder, but made no observation upon the merits of the appeal, and had no communication or conversation with the Recorder and aldermen beyond directing attention to the seat in question. That he went into the other carriage with them, at

Macnamara's request, for the purpose of inspecting a seat differently constructed, but had then no other communication with them than as above mentioned; and that his being with them at the inspection of the carriages was purely accidental. That he did not return with them into their Court, but went to the Court of Common Pleas, where he was engaged in the business of the Petty Sessions for two hours. That, there being some cases at the Petty Sessions which required a second alderman, he went into the Court of Quarter Sessions to see if an alderman could be spared to assist him, and with no other object: that, when he entered the Court, the appeal was being heard, and, "finding Mr. Alderman Finnis sitting at the nearest end of the bench, he spoke to him respecting the Petty Sessions business, and, whilst so speaking, sat next to the said Alderman Finnis: that he remained there for a few minutes only, and that, during the whole of the time he was in the said Court, he did not speak at all to the Recorder or to either of the aldermen except the said Alderman Finnis, and that the few sentences he addressed to him related entirely and exclusively to the business of the Petty Sessions on account of which he had entered the said Court, and that not a word was said by either himself or Mr. Alderman Finnis touching the said appeal or in any manner relating to the subject-matter thereof." That, after quitting the Court of Quarter Sessions, he did not return thither on that day, but had left town before the appeal was concluded. There were additional affidavits by the Recorder, Alderman Finnis, and other persons, confirmatory of these statements, and adding that no objection was taken to Alderman Wilson's presence in Court by the appellant or his solicitor or counsel. Mr. Pearson stated that he supported the conviction in the discharge of his ordinary duty as solicitor to the Corporation of London, and would have charged the costs to the Court of aldermen if the appeal had been successful and costs awarded; and that Alderman Wilson would not have been liable to any expenses in that event.

*Sir F. Kelly, Solicitor General, *Clarkson*, and *Bodkin*, now showed cause, and contended that, even assuming Alderman Wilson to have been an interested party, which [*424 he was not, the case was distinguishable, on the facts deposed to, from *Regina v. The Cheltenham Commissioners*, 1 Q. B. 467 (E. C. L. R. vol. 41), *Regina v. The Justices of Hertfordshire*, 6 Q. B. 753 (E. C. L. R. vol. 51), and *Regina v. Justices of Suffolk* (suprà).

Byles, Serjt., *Bliss*, and *Pulling*, contrà, relied upon *Regina v. Justices of Suffolk* (suprà), and cited *Dobson v. Groves*, 6 Q. B. 637 (E. C. L. R. vol. 51).

Lord CAMPBELL, C. J.—The ground of this application is, substantially, that the proceeding at Quarter Sessions was *coram non judio*, which it would have been if an interested party had been proved to have formed part of the Court. During this term we have expressed our anxiety that the greatest respect should be paid to the maxim which forbids any man to be judge in his own cause. There is no doubt that a person who is interested in the cause ought not to appear on the bench as a judge. My predecessor Holt, in a case in which he was interested while Chief Justice (as to the appointment of a Chief Clerk), appeared, not on the Bench but at the bar, instructing counsel. The charge here, on the affidavits in support of the rule, is that Alderman Wilson formed part of the Court which dismissed Macnamara's appeal. But I think the affidavits in answer are satisfactory. It appears that Alderman Wilson had no intention of being present to hear the appeal, but had made an arrangement inconsistent with his doing so, namely to sit at the Petty Sessions; and he was doing so when the appeal was called on. As to his entering the omnibus: he saw it casually, and said to Macnamara "I suppose you would not like me to get in;" and upon Macnamara's answering that he would, he entered the carriage. That does not meet my entire approbation; but it is no sufficient ground for the objection taken on the other side. As to his presence afterwards in the Court of Quarter Sessions, he entirely clears himself. He says that he went there merely to seek the assistance of another magistrate; he talked to no one but Alderman Finnis, and that only upon the matter which occasioned his coming to the Court: and in these statements he is confirmed by other testimony. There is no ground for saying that he took any part in the hearing of the appeal. I do not approve of what took place in the omnibus; Mr. Wilson should not have asked to go in, nor done anything there in the absence of Macnamara. It does not appear that he did anything to influence the decision; but he was guilty of an indiscretion; and I therefore think this rule should be discharged without costs.

WIGHTMAN, J.—I agree that, if Alderman Wilson had taken a part in this decision, the present motion would have been well founded. But it appears that he took no part either in the proceedings or in the determination. There was indeed an indiscretion in his [*425 conduct; but, it appears by his statement, not such as would influence the decision of the other magistrates. The application therefore fails.

EALE and CROWTON, JEs., concurred.

Rule discharged, without costs.

(The anecdote of Holt, C. J., above referred to, is related in Lord Campbell's *Lives of the Chief Justices of England*, vol. 2, p. 176, citing Show. Parl. Ca. 111, and Skinn. 354. The cause, *Bridgman v. Holt*, was tried at bar, before the three puisne Judges and a jury.)

LOWNDES v. The Earl of STAMFORD and WARRINGTON.

April 30.

The salary of an auditor and superintending manager of an estate, holding office during the joint lives of the employer and himself, is not a payment apportionable under stat. 4 & 5 W. 4, c. 22, s. 2.

The indenture by which L., the auditor, engaged himself stipulated that L., who was a barrister, should relinquish so much of his practice as was incompatible with the office, and the whole if required by S., the employer: that, if S. should revoke the appointment without adequate cause, the adequacy to be determined as after mentioned, or if L. should resign upon adequate cause, the adequacy to be determined in like manner, S. should allow L. a retiring pension of 1000*l.* a year during their joint lives: and that the adequacy of the cause for any revocation or resignation should be determined by a referee, who was named; with a proviso for other reference in case of necessity. Held:

That the stipulation for reference was not void as ousting the Courts of jurisdiction. But That L., being dismissed, as he alleged, wrongfully, might sue for the retiring pension without having first procured the adequacy of the cause to be decided upon by the referee; the sense of the agreement being that the onus of proving the adequacy of the cause to be adjudicated upon should lie upon that party who did an act (whether revocation or resignation) determining the employment.

COVENANT. Action commenced, 7th August, 1850. The first count stated that heretofore, &c., to wit, on 2d January, 1849, by indenture between defendant of the one part and plaintiff of the other part (pro-fert), defendant appointed plaintiff to be auditor and superintending manager of all defendant's estates, including all or any estates thereafter to be by him acquired (other than his estates in the counties of Leicester and Nottingham), such appointment being considered as taking *effect from 7th January, 1848, from which time the duties of *426] the said offices of auditor and superintending manager had been performed by the plaintiff; and plaintiff did thereby accept the said offices of auditor, &c. And defendant did by the same indenture covenant with plaintiff that he, defendant, would, so long as plaintiff should hold the said offices, pay to plaintiff the annual salary of 1800*l.* by equal half-yearly payments on 7th July and 7th January: and, further, that, in case the defendant should revoke the said appointment thereby made without adequate and just cause, then and in such case, from and after such revocation, defendant would, during the remainder of the joint lives of himself and plaintiff, pay to plaintiff a clear annual sum of 1000*l.* by equal half-yearly payments on the said half-yearly days therein and hereinbefore mentioned, the first of such payments to be made on such of the said half-yearly days as should first happen after such revocation. As by the same indenture, &c., will more fully appear. Averment that, although from the time of the making of the said indenture hitherto plaintiff hath duly performed and fulfilled all things therein on his part to be performed, &c., and hath, to wit, during all the time last aforesaid, continued to hold the said offices of auditor and superintending manager to which he was so thereby appointed, &c.: and although, after the making of the said indenture, and before the commencement of this suit, viz., on 7th July, 1850, a large sum of

money, viz., 900*l.* for the period of time between 7th January, 1850, and 7th July, 1850, during which the plaintiff held the said offices of auditor and superintending manager, became and was, under and by virtue of the said covenant in that behalf in the *said indenture contained, due from and payable by the defendant to the plaintiff: yet the defendant hath not paid the sum or any part thereof. [*427]

The second count stated that, on 2d January, 1849, the indenture in the first count mentioned (profert) was made, &c., as in that count mentioned; and that, although, from the time of the making thereof hitherto, plaintiff hath always duly performed and fulfilled all things, &c., and although plaintiff from the time of the making thereof continued to hold the said offices of auditor, &c., until and upon a certain day which elapsed between 7th January and 7th July, 1850, and before the commencement of this suit, viz., 27th May, 1850, on which day defendant, without adequate and just cause in that behalf, revoked the said appointment of plaintiff so made by the said indenture as aforesaid: and although, after such revocation and before the commencement of this suit, viz., on 7th July, 1850, the same day being such one of the said half-yearly days of payment as, according to the tenor and effect, true intent and meaning, of the said indenture, first happened after such last-mentioned revocation, a large sum of money, viz., 500*l.*, being the first payment of the said clear annual sum of 1000*l.*, became due from defendant to plaintiff under and by virtue of the said covenant in that behalf, &c., and although defendant has, from the time of the said revocation hitherto, ceased to pay, and has not paid, to plaintiff the said salary of 1800*l.* or any part thereof, and although a defendant has not either before or since the said revocation, or at any time hitherto, obtained, nor has there been, any determination by the said Lieut. Col. John Wildman, or any other referees or umpire, that defendant had, or that there was, adequate and *just cause of or for such revocation by defendant as aforesaid, and although a reasonable time [*428] for the obtaining such determination elapsed long before the said 7th July, 1850, yet no part, &c.: breach, non-payment of the sum claimed by this count.

The deed was set forth on oyer. The plaintiff thereby accepted the "offices of auditor and superintending manager," and covenanted that he "shall not, during so long as he shall hold the offices to which he is hereby appointed, without the previous consent of the said Earl accept any other office or employment whatsoever, other than such other offices as he now holds with the privity and consent of the said Earl under the Earl Granville and his family, or may hereafter hold under the person or persons who may succeed to the estates and possessions of the said last named Earl, not exceeding in extent or requiring more time or pains for the performance of them than the offices which he now holds with such privity and consent as aforesaid; and shall relinquish and give up

his practice as a barrister so far as such practice may be incompatible with or in any manner interfere with the efficient and perfect discharge of the duties of the offices to which he is hereby appointed; and shall, if so required by the said Earl," "totally relinquish and give up his practice." There was also a covenant by the Earl, that, in case the said W. L. L. "shall cease to perform the duties of the offices to which he is hereby appointed, by reason of his becoming incapable of performing such duties from permanent illness or infirmity, or in case the said Earl shall revoke the appointment hereby made, without adequate and just cause, the adequacy and justice of such cause to be determined as *429] hereinafter *mentioned, or in case the said W. L. L. shall resign the offices to which he is hereby appointed upon adequate and just cause, the adequacy and justice of such cause to be determined as hereinafter mentioned, then and in any such case, from and after such becoming incapable, revocation, or resignation, as the case may be, the said Earl shall, during the remainder of the joint lives of the said Earl and W. L. L., pay to the said W. L. L. and his assigns a clear annual sum of 1000*l.* by equal half-yearly payments on the half-yearly days hereinbefore mentioned; the first of such payments to be made on such of the half-yearly days as shall first happen after such becoming incapable, revocation, or resignation. That the adequacy and justice of the cause of any revocation by the said Earl of the appointment hereby made by him, and the justice and adequacy of the cause for the resignation of the said W. L. L. of the offices to which he is hereby appointed, shall be determined by John Wildman, of Brook Street, Grosvenor Square, Esquire, a Lieutenant Colonel in her Majesty's army, if living and able and willing to determine the matter in question." There was a proviso for further reference, and umpirage, in case of necessity.

• The defendant pleaded, to the first count: "That, heretofore, and before the 7th day of July, A. D. 1850, viz., on the 27th day of May, A. D. 1850, he the defendant revoked the said appointment of the plaintiff in the said first count mentioned; and he the plaintiff thereupon and thereby then ceased to hold, and hath thence hitherto ceased to hold, the said offices to which he was so appointed as in the said first count mentioned: Without this, that the plaintiff held the said offices *430] of auditor and superintending manager, to which he was so *appointed as aforesaid, during the whole period of time between the 7th day of January, A. D. 1850, and the said 7th day of July, A. D. 1850, in manner and form," &c. Conclusion to the country.

To the second count the defendant demurred, assigning for causes, among others: For that the plaintiff ought to have shown in proof and support of his title to the annuity of 1000*l.* that he had obtained, or that there had been, a determination, in the mode prescribed by the indenture, as to the adequacy and justice of the cause of revocation, and that it had been thereby determined that the revocation was with-

out adequate and just cause: and for that, although it is alleged in the 2d count that defendant hath not obtained any determination in the prescribed mode as to the adequacy and justice of the cause of revocation, it does not appear that a determination has not been obtained by the plaintiff; and that it does not appear that plaintiff was ready and willing to concur with defendant in obtaining a determination in the prescribed mode; nor does it appear whether or not Colonel Wildman is living, and able and willing to determine the matter, or how, under the actual circumstances, the same might and ought to have been determined: and, although it is alleged that a reasonable time for obtaining such determination elapsed long before 7th July, 1850, it does not appear whether such allegation refers to the plaintiff or defendant obtaining such determination. The plaintiff joined in demurrer.

The plaintiff demurred to the plea to the first count, assigning for causes, among others: That the inducement answers only a part of the alleged cause of action, though the traverse professes to answer the whole; *that the traverse is taken upon matter not alleged nor necessarily implied by the count; that the revocation does not [*431 appear to have been such as would disentitle the plaintiff to damages; &c. Joinder.

The demurrers were now argued.(a)

Sir *F. Thesiger*, for the plaintiff.—First: The plea to the first count is insufficient. The count claims the entire half-year's salary from January 7th to July 7th. The traverse denies that the plaintiff held his offices during that entire period: but this is no answer, at any rate to the whole of the demand; for, in whatever way the plaintiff's holding of office was determined during the half-year, he was entitled to an apportionment of salary, under stat. 4 & 5 W. 4, c. 22, s. 2.(b) [Lord

(a) Before Lord Campbell, C. J., Wightman and Erle, Ja. Crompton, J., took no part in the decision, having been counsel in the cause.

(b) Stat. 4 & 5 W. 4, c. 22, s. 2, enacts: That all rents service, &c., "and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this Act;" "shall be apportioned so and in such manner that on the death of any person interested in any such rents," &c., "or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents," &c., "and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be) including the day of the death of such person, or of the determination of his or her interest;" "and that every such person, his or her executors," &c., "shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents," &c., "and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents," &c., "and other payments if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this Act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this Act in any action or suit at law or in equity."

*432] **CAMPBELL, C. J.**—Would the language of that clause be applicable in the case of a servant discharged for good cause? Apparently it would, in a case within the terms of the Act. But, without resorting to the statute, the plaintiff here must recover his whole demand, because the defendant states that he revoked the appointment during the half-year, but does not allege that he did so for just and adequate cause.

Secondly, the second count is good. An agreement that all disputes shall be referred to arbitration cannot oust the jurisdiction of a Court of law or equity. This was said by Lord Kenyon, in *Thompson v. Charnock*, 8 T. R. 139, to have been “decided again and again.” *Kill v. Hollister*, 1 Wils. 129, there cited, exemplifies the rule. *Best, C. J.*, acted upon that decision in *Goldstone v. Osborn*, 2 Car. & P. 550 (E. C. L. R. vol. 12). The rule is the same whether the arbitration clause applies to the whole or part only of the deed. [**Lord CAMPBELL, C. J.**—If a perfect cause of action has accrued, the Courts cannot be ousted of jurisdiction to enforce it; but the parties might perhaps agree that the existence of a cause of dismissal should be ascertained by reference.] Nothing on this record shows that a cause of action has not attached. If the jurisdiction could be ousted here, the plaintiff might be without remedy; for a Court of equity will not order specific performance of an agreement to *refer; *Gourlay v. The Duke of Somerset*, 19 Ves. 429, 431, per Sir W. Grant, M. R. But, assuming that the agreement for reference was binding, the question is, whose duty it was to take the steps for ascertaining the sufficiency or insufficiency of the supposed cause of revocation? According to the deed as set out on oyer, it lay upon the defendant, if he took the step of revoking the plaintiff’s appointment, to show that he had done so on proper grounds. [**Lord CAMPBELL, C. J.**—You say that he had only a conditional power of revoking. **WIGHTMAN, J.**—That, if the plaintiff resigned, he was to take the steps for establishing that he had done so on proper grounds; and, if the defendant dismissed, he was to proceed in the like manner: that whoever did the act determining the relation was to take the initiative in a proceeding to arbitration.] That is the effect of the covenant. The employment was intended to be permanent; he who put an end to it was, *prima facie*, a wrongdoer. There is, virtually, an appointment during good behaviour: in the absence of any arbitration clause, Lord Stamford, if he dismissed the plaintiff, would have been bound to show a cause of dismissal; and it makes no difference that the parties here have provided a mode of ascertaining such cause. The defendant does not plead that there was such cause, but demurs; thereby assuming that the plaintiff is to lie under the onus of negating every ground of dismissal that could have arisen. But the grounds, if any, were in the defendant’s knowledge; and it is reasonable that he should be required to show them.

J. A. Russell, contra.—As to the plea. The plaintiff, *in his first count, sues as having held the office during the entire half- [*434 year: if that is a material fact, the traverse of it is good. If the count had been upon a quantum meruit for the time during which he actually served, as in *Osborne v. Rogers*, 1 Saund. 267, the traverse would, according to that case, have been bad: but the plaintiff relies upon a covenant to pay an annual salary on certain days: and, if the service was determined before one of the days arrived, he cannot have the salary apportioned, unless under stat. 4 & 5 W. 4, c. 22. Countess of *Plymouth v. Throgmorton*, 1 Salk. 65, shows that, at common law, it could not be done. (Sir *F. Thesiger* admitted that there could be no apportionment here but under the statute.) [Lord CAMPBELL, C. J.—The preamble of the statute, sect. 1, if we may take the law from it, decides that.] Then, the statute clearly does not apply to this claim. It stands upon the same footing as a demand for wages, which no one has ever claimed to apportion instead of suing on a quantum meruit. The words “and all other payments,” following the words “rents charge and other rents, annuities,” &c., must refer to payments ejusdem generis. [Lord CAMPBELL, C. J.—Such payments, you would say, as will still be made to some one, though the payment to a particular individual has ceased.] “Determination” “of the interest of any such person” cannot apply to interest in the receipt of a salary. [Lord CAMPBELL, C. J.—Is there any applicable case on the statute?] None has been found.

The second count is bad. No perfect cause of action upon this agreement could exist till the adequacy or inadequacy of the cause of dismissal had been *ascertained. The words “in case the said Earl shall revoke,” &c., “without adequate and just cause,” are [*435 qualified by those which follow; “the adequacy and justice of such cause to be determined as hereinafter mentioned.” The qualifying words are an inseparable context. No cause could be adequate or inadequate except as might be determined by arbitration. The cases extant do not assist much towards deciding this; but *Thurnell v. Balbirnie*, 2 M. & W. 786,† bears some analogy to it, and is in the defendant's favour. In *Worsley v. Wood*, 6 T. R. 710, an insurance company undertook to indemnify the assured “according to the tenor of the printed proposals delivered with the policy.” By one of the proposals it was required that the person claiming indemnity should procure a certificate under the hands of certain persons as to his character and the bona fides of his claim. The Court held that the words “according,” &c., introduced an essential qualification of the contract to indemnify, and that the assured was not in a situation to demand the indemnity until he procured the certificate, though, as he alleged, the parties who should have signed it wrongfully refused to do so. The determination of Col. Wildman is a condition precedent here, as the certificate was in that case. [Lord

CAMPBELL, C. J.—When was the adequacy of the cause to be ascertained here?] The ascertaining of it is a condition precedent to the recovery of compensation. [Lord CAMPBELL, C. J.—May there be a dismissal before the sufficiency of the cause is ascertained? Is the dismissing party to punish first and hear afterwards?] The plaintiff's liberty to resign is *436] upon the same terms. [WIGHTMAN, J.—The *power to revoke, as the words of the indenture imply, is upon "adequate and just cause, the adequacy and justice of such cause to be determined as hereinafter mentioned."] Suppose judgment were given for the plaintiff in this case: it might turn out on subsequent inquiry that there was just cause for dismissal; yet, if the plaintiff's argument prevail, a right to the half-yearly retiring allowance will have accrued to him in the mean time. [ERLE, J.—The covenant seems to be that the right shall vest if the one party dismisses without Col. Wildman's approval, or if the other resigns without Col. Wildman's approval; that the party claiming to determine the agreement must show a decision by Col. Wildman.] The retiring salary is to be payable "from and after such" "revocation or resignation;" that is revocation or resignation without such cause as Col. Wildman should pronounce adequate. If, indeed, the words had been, that the retiring salary should be payable from and after revocation or resignation, provided that, unless the adequacy or inadequacy of the cause were determined as before mentioned, the benefit should not accrue, it would have been necessary to plead such a proviso as qualifying the covenant for payment; *Clayton v. Kynaston*, 2 Salk. 573; in which case Holt, C. J., says, "that where the proviso goes by way of defeasance, it must be pleaded by him that takes advantage of it;" but, as he lays down immediately afterwards, where it "alters the sense of the covenant, by explaining and tying up the" thing stipulated for "to a particular time, which would not have been understood on the general covenant, by which means it becomes a part of the covenant," the party relying on the covenant *437] "must plead accordingly." The latter part of the dictum applies to this case. The plaintiff is not, as was suggested on the other side, put under the difficulty of proving a negative: he might have alleged, and shown, affirmatively, a finding by Col. Wildman that the dismissal was without just cause.

Sir F. *Thesiger*, in reply.—As to the first point, the consequence of the argument for the defendant is that, even if the plaintiff had died, the case would have been beyond the reach of the Act. But the words of sect. 2 are quite general: "all rents charge," &c., "and all other payments of every description." This cannot mean merely payments ejusdem generis. [ERLE, J.—The enumeration seems limited at any rate to payments "derived" from an "estate, fund, office, or benefice." The question may be whether the employment of auditor or manager, though called an office in the indenture, is such an office as the Act con-

templates. Lord CAMPBELL, C. J.—Suppose a person holding an employment of this kind served three months and then absconded.] It is not necessary to contend that there might not be such misconduct as would disentitle to the salary: but that is not the present case. As to the second point, the question, what is a condition precedent, depends on the terms of each particular instrument. Here the plaintiff, on the one hand, was stipulating to give up his profession: the defendant, on the other, was entering into a contract which made it important that he should not be at the mercy of the plaintiff if he were disposed suddenly to depart from his engagement. Both evidently intend to use such language as will afford the most direct safeguard. Hardship may arise equally *on either side from a close observance of the [*438 terms. *Thurnell v. Balbirnie*, 2 M. & W. 786,† does not resemble this case. There the agreement was to purchase at a valuation to be made by valuers on each side: the defendant and his valuer would not proceed; and the plaintiff had the goods valued, and sued for the price. The count, showing these facts, was held insufficient; but there there could have been no contract to take and pay for the goods without such a valuation as had been agreed upon: and the judgment turned in a great measure upon the want of explicit allegations in the count. *Worsley v. Wood*, 6 T. R. 710, is not applicable. [Lord CAMPBELL, C. J.—It is a totally different case.] There the covenantee had stipulated for certain things to be done on his part, which were not done: here the covenantor has done an act alleged to be contrary to his covenant, which it lies on him to justify. *Cur. adv. vult.*

Lord CAMPBELL, C. J., in the same term (May 6th), delivered the judgment of the Court.

We think that on the demurrer to the plea to the first count there ought to be judgment for the defendant.

The plea, averring that the defendant had revoked the appointment of the plaintiff before the 7th day of July, 1850, when the half-year's salary sued for is alleged to have become due, concludes with a special traverse of the allegation that the plaintiff held the office of auditor during the whole half-year down to the said 7th day of July.

The plaintiff's counsel, admitting that he can only *seek to [*439 recover a portion of this half-year's salary, and that at common law it could not be apportioned, rests this claim entirely on stat. 4 & 5 W. 4, c. 22, s. 2. The language here employed by the Legislature is very general; but we do not think that it was meant to apply to a payment like this, under a contract between employer and employed, for services performed, where the payment entirely ceases upon the determination of the claimant's right to receive it. The statute makes the enumeration of "the estate, fund, office, or benefice from or in respect of which" the rents or other payments "shall be issuing or derived;" and the deed contains the expression of "offices of auditor

and superintending manager" to which the plaintiff was appointed: but, looking to the context, it appears to us that these are not offices within the meaning of the enactment, not being of a public nature, and no rents nor payments issuing or being derived from or in respect of them. The dismissal from an employment created by contract can hardly be called the determination of the *interest* of the person employed. The time fixed by the statute, when the apportionment is made recoverable, is "when the entire portion of which such apportioned parts shall form part shall become due and payable." This contemplates a case where the party who has to pay will have to pay for the whole period to some one, and not a case where the payment entirely ceases with the determination of the interest of the person receiving the apportionment, and where the entire portion of which this forms a part never does become due or payable. We are therefore of opinion that the half-yearly payment in question remains unapportionable, as at common law.

*440] *On the demurrer to the second count of the declaration our judgment will be for the plaintiff. The allegations in this count appear to us sufficient to show that, after the revocation, he was entitled to the sum of 1000*l.* a year, payable half-yearly. We think that the deed makes no attempt to oust Courts of their jurisdiction; and that the numerous cases cited on this subject are wholly inapplicable. We have to persue the deed executed by these parties, and to see what was the real contract between them. If the defendant had power to dismiss the plaintiff upon the statement that he had adequate and just cause, throwing upon the plaintiff, after the dismissal, the burden of appealing to Colonel Wildman, the second count of the declaration would be bad: but we think that the defendant had no power of dismissal without giving a right to the allowance of 1000*l.* a year, till he had previously ascertained by the judgment of Colonel Wildman or of the two referees, one named by each party, or of one referee named by himself, that he had adequate and just cause to revoke the appointment. The obtaining of this judgment was a condition precedent to the reserved power of revocation; and the payment of 1000*l.* a year was to become due if there was a revocation without adequate and just cause, so previously ascertained. It appears by the deed that the plaintiff was a practising barrister who, in consideration of this lucrative appointment, covenanted to give up practice as far as was inconsistent with the duties he undertook as auditor, and to give up practice altogether at the request of the defendant. It was of great importance to him that he should not be capriciously dismissed from his auditorship. Again, the defendant *441] placed the plaintiff in a situation of great *confidence; and very inconvenient consequences might follow to the defendant, if the plaintiff, from caprice, or from wishing to enter into some still more profitable employment, should, without adequate and just cause, resign the auditorship. But parties had entire confidence in Colonel Wild-

man; and the agreement between them was that, till his judgment had been obtained that there was adequate and just cause for removal or resignation, the one party should not be at liberty to remove nor the other to resign; the defendant covenanting that, if he removed without such judgment, he should pay the plaintiff 1000*l.* a year during their joint lives. If such was the agreement, the demurrer to the second count cannot hold; for the plaintiff was not bound to show that he had obtained, or that there was, any determination in the mode prescribed as to the adequacy or justice of the revocation, or that it had been determined that the revocation was without adequate or just cause; nor was it necessary to aver that a reasonable time had elapsed for the defendant or for the plaintiff to have obtained such determination, or to allege any excuse for the plaintiff not having obtained it. The revocation having taken place without the previous determination, in the prescribed form, of the existence of adequate and just cause, the annuity of 1000*l.* became payable, and the arrear claimed is recoverable.

The decision of the Court of Exchequer in *Thurnell v. Balbirnie*, 2 M. & W. 786,† was on a contract of a totally different nature, the defendant having agreed to purchase goods from the plaintiff, the price of which was to be fixed by two individuals named; and it was very properly held *that the defendant could not be liable for the price [*442 of the goods until they had been valued by both valuers, pursuant to the agreement; at least without an averment that the defendant prevented the valuation. *Worsley v. Wood*, 6 T. R. 710, proves that, if there be a condition precedent, to be performed by the plaintiff before he has a right of action, his declaration must aver the performance of the condition. Very sound doctrine is likewise to be found in *Clayton v. Kynaston*, 2 Salk. 574, respecting a proviso which goes by way of defeasance of a covenant; but it has no tendency to show that, upon the construction of this deed, if the defendant revoked the appointment without adequate and just cause previously determined in the manner prescribed, he would not be liable for the payment sought to be recovered. On the second count, therefore, our judgment is for the plaintiff.

Judgment for defendant on the demurrer to the plea to the 1st count. For plaintiff on the demurrer to the 2d count.(a)

(a) A writ of error was afterwards brought by the defendant in the Exchequer Chamber. Upon the argument, that Court intimated a strong opinion that the first count was not maintainable; but they suggested that the question, whether the defendant had adequate and just cause for dismissing the plaintiff, must eventually, in some form, be made the subject of a reference, and that it had better be referred at once, without carrying the proceedings in the action any farther. Accordingly, that question was referred to the Recorder of London (the Right Hon. J. A. S. Wortley): it being arranged that the arrears and future payments of the annuity should depend upon the event of his decision. The Recorder afterwards made an award in the plaintiff's favour.

An agreement to arbitrate does not *Allegre v. Maryland Ins. Co.*, 6 Har. divest the Courts of their jurisdiction: & *Johns*. 408; *Randel v. Chesapeake*

Canal Co., 1 Harrington, 234; Gray v. to arbitration, does not preclude a right
 Wilson, 4 Watts, 39; Haggart v. Sel- of action for a breach of the agreement,
 den, 1 Selden, 422. if there be no arbitration pending when

A covenant, in an agreement to sub- the action is commenced, nor any award
 mit matters of dispute arising thereon had: Stone v. Dennis, 5 Porter, 231.

*443]

*HESELTINE v. SIELY. April 30.

To an action by payee against maker of a promissory note, the defendant pleaded that before the time of the making he was indebted to plaintiff and others, and filed his petition in the Insolvent Debtors' Court, and delivered a schedule, including his debt to the plaintiff, and a day was appointed for his examination. That plaintiff threatened to oppose his discharge unless defendant would give him promissory notes to the amount of his debt: and thereupon defendant, to induce plaintiff to abandon his opposition, made and delivered to him promissory notes, one of which was that now declared upon. And that defendant afterwards, by order of the said Court, was discharged, according to stat. 1 & 2 Vict. c. 110, from the said debt in respect of which the last-mentioned note was given; which discharge remains in full force.

Semble, by Wightman, Erle, and Crompton, Js., and Held by Lord Campbell, C. J., that the plea was double, and bad on demurrer. Leave to amend granted.

DEBT. 1st count, by plaintiff as payee, against defendant as maker, of a promissory note. 2d count, on an account stated.

Plea 2. That the account was stated of and concerning the cause of action in the first count mentioned: That, before the making of the note, defendant was indebted to Richard Clark in 42*l.* and to plaintiff in 48*l.* 6*s.*, and to other persons in divers other sums, and, being a prisoner in actual custody, &c., upon process at the suit of Clark for the said debt due to him, did, according to "the statute made and passed in the second year of the reign of her present Majesty," (a) file his petition in the Insolvent Debtors' Court for his discharge, &c.; and his estate was afterwards, by order under the Act, vested in the provisional assignee, and defendant delivered, subscribed, and filed a schedule, &c., in which was a full and true description of his said debt to the plaintiff, and the said Court appointed a day for defendant to be brought before it, to be dealt with according to the statute: Of all which premises in this plea aforesaid the plaintiff had notice, and then protested *444] and declared and *threatened the defendant that he the plaintiff would oppose his discharge unless defendant would make and deliver to plaintiff certain promissory notes for divers sums of money exceeding the amount of the said debt so due from defendant to plaintiff as aforesaid; and thereupon, to wit, on, &c., in order to induce plaintiff to abandon his said threat and not to oppose the discharge of him the defendant, he the defendant did then make and deliver to plaintiff the said promissory notes, one whereof is the said promissory note in

(a) 1 & 2 Vict. c. 110. It was assigned as a cause of demurrer, and mentioned in the argument, that this notice of the Act, not referring to it with certainty by its title or other distinctive mark, was insufficient.

the said first count mentioned. And defendant further saith that he the defendant afterwards, and after the making and delivery of the said promissory notes as aforesaid, to wit, on, &c., by a certain order made by the said Court for the relief of insolvent debtors in England held at the Court House, Portugal Street, &c. (he the defendant then being a prisoner in custody as aforesaid), was duly discharged according to the said statute of and from the said debt so due to the plaintiff as aforesaid, and in respect whereof he the defendant had made and delivered the said promissory notes; and the defendant avers that the said discharge still remains in full force and effect. Verification.

Demurrer, on the grounds of duplicity and repugnancy, and for other causes. Joinder.

Henry James, for the plaintiff.—The plea sets up two complete defences; one, the invalidity of the contract, according to *Hall v. Dyson*, 17 Q. B. 785 (E. C. L. R. vol. 79); the other, that defendant was discharged by the Insolvent Debtors' Court from the debt in respect of which the promissory note was given: *the consequence of which would be that the note itself, at least if it remained in the [445] payee's hands (and the plea does not show the contrary), is discharged also: *Reeves v. Lambert*, 4 B. & C. 214 (E. C. L. R. vol. 10). (a) [ERLE, J.—The facts of that case were very different from those pleaded here. WIGHTMAN, J.—Suppose the note, here, had been given after the discharge.] It is not necessary to say whether in that case the note would have been avoided; here it was given before the discharge. [ERLE, J.—If the note was given, not in satisfaction of the debt, but as a collateral security, do you say that the security is gone by reason of the discharge, notwithstanding the intention of the parties?] The plaintiff contends only that two defences are set up, each of which might be an answer. It is not pleaded that the note was given as a collateral security. If the plea had stated that, the plaintiff might have replied *De injuriâ*; as it is, no one replication can answer it. The plea is bad also as setting up two distinct considerations for giving this note; the debt itself, and the plaintiff's forbearing to oppose; and not showing which is relied upon.

The Court then called upon

Ball, for the defendant.—This is the form of plea universally adopted since the New Rules. In 3 Chitty on Pleading, 40, 7th ed., there is a precedent in which both the unlawful agreement and the discharge are stated. In *Warner v. Haines*, 6 Car. & P. 666 (E. C. L. R. vol. 25), there was a plea containing both averments; and this is referred to in Chitty Junr.'s *Precedents, 334 (2d ed., by Pearson). [CROMPTON, J.—When you say that the discharge remains in full force [446] and effect, it looks very much like relying upon it as a defence. Lord CAMPBELL, C. J.—If the plaintiff had replied *De Injuriâ*, how much

(a) See *Beck v. Beverly*, 11 M. & W. 845.†

of the plea do you say the defendant would have been bound to prove?] He would have been obliged to prove the discharge; but the defence is the illegality. [ERLE, J.—You may perhaps contend that, if the plea had made no mention of the agreement not to oppose, but had merely stated that the note was given before the discharge, as collateral security for a debt inserted in the schedule, and then alleged the discharge, such a plea would not have been bad; and that the agreement is mere surplusage and does not vitiate the plea. CROMPTON, J.—Matter badly pleaded may render a plea double; whether the averments here do so may be a disputable point, according to *Regil v. Green*, 1 M. & W. 328.† Do you wish to settle it at your risk, if you can have leave to amend? I doubt if you are safe.] *Ball* mentioned *Harrison v. Cotgreave*, 4 Com. B. 562 (E. C. L. R. vol. 56). [WIGHTMAN, J.—Do you think you are safe? Lord CAMPBELL, C. J.—The defendant, after setting up one defence, the original agreement, alleges his discharge, which is also a good defence: in my opinion that is clear duplicity.]

Per Curiam,

Leave granted to amend.

*447] *The QUEEN v. The Inhabitants of the Township of HUSTHWAITE. May 1.*

A separate and distinct dwelling-house and land in the parish of H. were let to William A. and Thomas A. as joint tenants, the rent and value of the land, taken separately, being sufficient to confer a settlement on both. The farm was occupied by William, Thomas residing on another farm at a distance. Thomas paid the whole rent of the farm. The overseers of H. had always demanded and received payment of the rates in respect of the house and farm in question from Thomas: and, in the rate-books of H., "Atkinson, Mr.," appeared as the name of the occupier of the farm in two rates, and "Atkinson, Thomas," in a third.

Held, that the Sessions were justified in finding, First, that there was a sufficient occupation and payment of rent by William, and a sufficient assessment of him and payment of the rates by him, to give him a settlement in H. under stats. 1 W. 4, c. 18, and 4 & 5 W. 4, c. 76; and, Secondly, that he had been sufficiently charged with, and paid his share of, the public taxes of H. to gain a settlement under stat. 3 & 4 W. & M. c. 11.

ON appeal against an order of two justices, dated 18th June, 1850, for the removal of Ursula Atkinson, wife of William Atkinson, who had absconded to America, and her five children, from the parish of Knayton with Brawith to the parish of Husthwaite, both in Yorkshire, the Sessions confirmed the order, subject to the opinion of the Court upon the following case.

The settlement stated in the grounds of removal was that the pauper's husband, William Atkinson, had, at Lady day, 1844, rented a house and farm in the appellant parish, at the rent of 70*l.* a year, for one whole year ending Lady day, 1845, and paid the year's rent for the same; and that he was also assessed to the poor-rate of the township of Husthwaite, and paid the same in respect of the said dwelling-house and farm for one year during which he so occupied the same; and that,

during the whole period of his occupation, he resided and slept in the township of Husthwaite.

There were three grounds of appeal, traversing the renting, occupation, and payment of rates as stated in the grounds of removal. They were as follows.

*1. That the said William Atkinson did not acquire a settlement in the said township of Husthwaite, nor take and hire at [*448 Candlemas, in the year 1844, of Mr. John Buckle, from year to year, commencing on the 6th April, 1844, at the rent or sum of 70*l.* a year, a tenement consisting of a separate and distinct dwelling-house, farmhouse, or building, and 25 acres and upwards of land, situate in the said township of Husthwaite, as in the grounds of removal which accompanied the said order is alleged.

2. That the said William Atkinson did not hold and occupy the said dwelling-house and land under the said alleged hiring, in the said township, from the 6th April, 1844, until the 6th April, 1845; nor did he pay the said yearly rent for the said term of one year, as in the grounds of removal is alleged.

3. That the said William Atkinson was not assessed to the poor-rates of the said township of Husthwaite, nor did he pay the same rates in respect of the said dwelling-house and land for one year during which it is alleged he so occupied the same, in manner and form as in the said grounds of removal is alleged.

It was admitted by the attorneys for the respective parishes:

That, at or about the time in that behalf mentioned in the respondents' statement, the pauper's husband, William Atkinson, and his father, Thomas Atkinson, entered into an agreement with John Buckle, therein mentioned, the legal effect whereof was to give the said William Atkinson and Thomas Atkinson a joint tenancy from year to year in the tenement and at the rent in the respondents' statement respectively mentioned, commencing on 6th April, 1844.

*That the whole of the rent and the whole of the poor-rates [*449 in respect of the said tenement, for the year ending 6th April, 1845, were paid by Thomas Atkinson.

At the trial of the appeal, after the above admissions had been put in, it was proved that the house and farm were in fact hired and rented by the pauper's husband and his father, Thomas Atkinson, as joint tenants. That the pauper's husband entered on the farm at Lady day, 1844, and from that time resided there and managed the farm until Lady day, 1845, the farming stock belonging to him; the father, Thomas Atkinson, continuing, during the whole of the time aforesaid, to reside upon another farm, in the township of Balk, about five miles from the appellant township, and never sleeping at the farm in the appellant township but for two nights during the tenancy; but that the whole of the rent of the said tenement in the appellant township was bonâ

hide paid by the father, Thomas Atkinson, and that such tenement consisted of a separate and distinct dwelling-house and land; and that the land of itself, independently of the said dwelling-house, was of sufficient value, and the rent paid in respect thereof was of sufficient amount, to confer a settlement on both the said William Atkinson and the said Thomas Atkinson.

In the rate books of the appellant township for the years 1844 and 1845, which were produced by the overseers, the house and farm in question were described as "buildings and lands," and "Atkinson, Mr.," appeared in the column headed "name of occupier," as the person rated in two rates, made on 18th April and 17th July, 1844. In a third rate, made on 8th January, 1845, "Atkinson, Thomas," appeared under the column headed "name of occupier."

*450] *It was admitted that the overseers of the appellant parish had always demanded and received payment of the rates in question from Thomas Atkinson, the father.

The appellants objected that there was no sufficient proof of renting a tenement, so as to confer a settlement on the pauper's husband within the meaning of stats. 1 W. 4, c. 18, s. 1, and 4 & 5 W. 4, c. 76, s. 66, on the following grounds.

First: That, no rent having been actually paid by the hands of the pauper's husband, the Sessions could not infer that there was a sufficient payment of rent by him to satisfy that portion of the above statutes which requires the rent to be actually paid by the person hiring the tenement.

Second: That, as the statute requires the tenement to be either a separate and distinct dwelling-house or building, or land, or both, a joint tenancy of the house and farm in question did not confer a settlement on William Atkinson.

Third: That if there was a sufficient payment of rent by William Atkinson, there was no compliance with the requisites of stat. 4 & 5 W. 4, c. 76, s. 66, the pauper's husband not having been assessed to, or having paid, the rates within the meaning of that section.

Fourth: That, in case there was no sufficient proof of a settlement by renting a tenement on the grounds above stated, there was no sufficient proof of the settlement by the payment of rates under stat. 3 & 4 W. & M. c. 11, s. 6.

The Sessions overruled the above objections, and found, upon the evidence as above stated:

*451] First: That there was a sufficient payment of rent by the son (the husband of the pauper) to confer a settlement upon him.

Second: That a joint tenancy of the land in question conferred a settlement on the said William Atkinson.

Third: That the payment of rates by Thomas Atkinson, the father,

was, in point of law, a payment of rates by the son, so as to confer a settlement upon him.

Fourth: That the assessment and payment of rates above set forth was such an assessment and payment of rates by the said pauper's husband as (coupled with the renting of the tenement above-mentioned) did confer a settlement upon him under stats. 1 W. 4, c. 18, s. 1, and 4 & 5 W. 4, c. 76, s. 66.

Fifth: That, in case the said assessment and payment of rates was not sufficient to enable the pauper's husband to obtain a settlement by renting a tenement under the last-mentioned statutes, the Sessions found that it was such a charging with and payment of his share to the public taxes or levies of the parish of Huthwaite as would confer a settlement upon him therein under stat. 3 & 4 W. & M. c. 11, s. 6.

If the Court of Queen's Bench should be of opinion that there was no evidence of settlement, either by renting a tenement or by payment of rates, on the grounds above stated, the order of Sessions was to be quashed; but, if the Court of Queen's Bench should be of a contrary opinion, then the order of Sessions to stand confirmed.

Rose and Lefroy, in support of the order of Sessions.—First, the pauper's husband acquired a settlement, under stat. 3 & 4 W. & M. c. 11, s. 6, by payment of rates. *Regina v. St. Mary Kalendar*, [452 9 A. & E. 626 (E. C. L. R. vol. 36), decides that a renter and occupier of a tenement within the meaning and provisions of stat. 6 G. 4, c. 57, s. 2, may gain a settlement under stat. 3 & 4 W. & M. c. 11, s. 6, by payment of the poor-rate for even a part only of the year; and *Regina v. St. Lawrence in Appleby*, 6 Q. B. 842 (E. C. L. R. vol. 51), shows that, where, as in the present case, a dwelling-house and land are let to two joint tenants, either of them is an occupier within the provisions of the former statute, in respect of his joint tenancy of the land, if the renting, as in the present case, is in other respects within the provisions of the Act. The payment of the rates by Thomas Atkinson, the father, must be considered as a payment on behalf of the son also, on the principle, adverted to by the Court in *Right dem. Fisher v. Cuthell*, 5 East, 491, 498, that every act done by one of two joint tenants for the benefit of both is binding upon the other.

Next, the pauper's husband acquired a settlement, under stats. 1 W. 4, c. 18, s. 1, and 4 & 5 W. 4, c. 76, s. 66, by renting and occupying the tenement in question, the rent and poor-rates in respect of it having been paid for one year. As regards the occupation, *Regina v. St. Lawrence in Appleby* shows that the joint tenancy is sufficient. But it is objected, with respect both to this and the first-mentioned ground of settlement, that the pauper's husband is not distinctly named in the rate books as the occupier; and that the rates, as well as the rent, were in fact paid by Thomas Atkinson, the father. But in *Rex v. Hockmondwicke*, 2 Doug. 564, it was held that, where the actual occupier

was known to the parish, payment of rates by him was a sufficient *453] *payment to give him a settlement, under stat. 3 & 4 W. & M. c. 11, s. 6, even though another name appeared in the rate books as that of the occupier. *Rex v. Painswick*, Bur. S. C. 465, *Rex v. Walsall*, Cald. 35, and *Regina v. St. Marylebone*, 15 Q. B. 399 (E. C. L. R. vol. 69), are to the same effect; and so is *Regina v. Hulme*, 4 Q. B. 538 (E. C. L. R. vol. 45), as regards an assessment under stat. 4 & 5 W. 4, c. 76, s. 66. And, as has been already stated, the payment by the father must be held to have been made on behalf of the pauper's husband, the other joint tenant and the actual occupier. *Rex v. Bridgewater*, 3 T. R. 550, (a) shows that the payment need not have been actually made by the occupier himself. And, on the principle just relied upon, the payment of the rent by Thomas Atkinson must also be considered as a payment on behalf of both William and Thomas.

Bliss and *E. P. Price*, contra.—Under stat. 3 & 4 W. & M. c. 11, s. 6, the party "charged" is the party who must pay the rate; and, under stat. 4 & 5 W. 4, c. 76, s. 66, the party who is "assessed to the poor-rate" must "have paid the same" for one year, in order to gain a settlement. Now here the pauper's husband had neither been charged with or assessed to, nor has he paid, the rates. The Sessions have not found that there was an actual assessment of, or payment by, him; but only that, upon the evidence before them, there was what amounted to a constructive payment by him. They do not find that the words "Atkinson, Mr.," in the rate books, meant William Atkinson; and the *454] facts *stated in the case tend strongly to show that Thomas Atkinson, the father, was meant. The cases which have been cited of misdescription or nondescription in the rate books were cases in which the description might possibly apply to the pauper, and could not apply to any one else. That is not so here; nor can it be contended that the payment by Thomas Atkinson, the father, was payment on behalf of, and therefore, practically, payment by, the son. There is no evidence of that; nor is there anything to show that Thomas Atkinson, who was himself an occupier, did not pay the rates as such. [Lord CAMPBELL, C. J.—On behalf of himself and the other joint tenant.] The other is not mentioned in the rate books. The words "Atkinson, Mr.," must apply to Thomas, who was clearly treated by the parish as the party rateable. No doubt the Sessions have found that the pauper's husband did occupy the tenement; but, the Sessions having sent up the facts upon which this finding was based, as well as the finding itself, this Court is at liberty to inquire into the propriety of such finding; *Rex v. Field*, 5 T. R. 587. But, assuming that the pauper's husband was the party assessed, the payment by the father would then be perfectly voluntary. His joint tenancy does not raise

(a) See *Rex v. South Kilvington*, 5 Q. B. 216 (E. C. L. R. vol. 43); *Regina v. Benjeworth*, 3 E. & B. 637 (E. C. L. R. vol. 77).

the presumption of agency. No person is liable to pay the rate but the party actually rated; and payment by another on his behalf would not give him a settlement; *Rex v. Weobley*, 2 East, 68. There is no evidence of any request by, or authority from, William to Thomas; and payment by Thomas could not, as in *Rex v. Bridgewater*, 3 T. R. 550, be *considered as money paid to the use of William at his [*455 request.

Then, as to the question of renting, it was no doubt held, in *Regina v. St. Lawrence, Appleby*, 6 Q. B. 842 (E. C. L. R. vol. 51), that the words "separate and distinct," in stat. 6 G. 4, c. 57, s. 2, apply only to "dwelling-house or building," and not to "land." But the section clearly goes on to provide that the tenement, whether dwelling-house or land, must be *rented* by one person. [Lord CAMPBELL, C. J.—*Regina v. St. Lawrence in Appleby* is against you on that point.] The attention of the Court there does not appear to have been directed to *Rex v. Berks-well*, 6 A. & E. 282 (E. C. L. R. vol. 33),^(a) where it was held that the whole subject-matter of the demise must be occupied by the party renting the tenement. *Regina v. Caverswall*, 10 A. & E. 270 (E. C. L. R. vol. 37), is directly in point.

Lord CAMPBELL, C. J.—If there is any evidence of a settlement, either by renting and occupying a tenement or by payment of the rates, upon the facts set out in the case, we are to confirm the order of Sessions; and I am of opinion that there is such evidence. First, as to the renting and occupying: the tenancy of the pauper's husband was a joint tenancy; but this Court, in *Regina v. St. Lawrence, Appleby*, came to the conclusion, after deliberate discussion, that the words "separate and distinct," in stat. 6 Geo. 4, c. 57, s. 2, apply only to "dwelling-house or building," and not to land. The fact of the tenancy being joint is, therefore, immaterial in the present case, the value of the land so held being sufficient to satisfy the provisions of sect. 2. I also *think there [*456 is evidence that the pauper's husband was assessed. It is clear that he was the sole occupier of the farm; and, as it must be presumed that this fact was known to the parish officers, there is evidence to show that "Atkinson, Mr.," in the rate books, referred to him. Then, as to the payment of the rates, and the rent, I think there is evidence to show that there was, practically, a payment by the pauper's husband. Thomas Atkinson, the father, by whom they were actually paid, was not a stranger, but a joint tenant with William, and, having paid, might bring an action or a suit in equity for compensation: or, at all events, in settling what may be called the joint account, he might take credit for such payments as having been made on behalf of himself and the other joint tenant. If both had been jointly assessed, and Thomas had paid the rate, that would clearly have been a payment by both. I think, therefore, that there is evidence of a sufficient renting and occupying

(a) See *Regina v. Ripon*, 7 Q. B. 225 (E. C. L. R. vol. 53).

of a tenement by the pauper's husband, and of an assessment upon, and payment of rates by, him; and that therefore the Sessions were justified in finding that he had gained a settlement.

WIGHTMAN, J.—We are simply to say whether there is any evidence of a settlement, by renting and occupying a tenement, or by payment of rates. That involves two questions; first, whether the pauper's husband was assessed, and, secondly, whether there was a payment of the rates by him. As to the first question, it is clear that he was the party in actual possession of the tenement. There was, therefore, some evidence from which the Sessions might draw the conclusion that "Atkinson, M.," in the rate books, referred to him. With respect *457] to the question of payment I have had much more difficulty. However, as Thomas Atkinson, by whom the rate was actually paid, had a joint interest with the pauper's husband, and was not a mere stranger, and as the rate is a charge affecting the joint occupation, the payment may be considered as made on behalf of the party really rateable in respect of such occupation.

(ERLE, J., was absent.)

CROMPTON, J.—I feel no doubt whatever that there is evidence to show that the pauper's husband was assessed. As regards the question of payment, I cannot say that I feel much difficulty. I think there was a payment by both, the father acting as the agent for both. The privity existing between them in respect of their joint tenancy was sufficient to give the father an authority to pay on behalf of the son.

Order of Sessions confirmed.

Sir THOMAS ROKEWOOD GAGE, Bart., v. The NEWMARKET Railway Company. April 27.

A railway Company, promoting in Parliament a bill for the extension of their line, which extended line would pass through the lands of the plaintiff, covenanted with him as follows: "In the event of the bill hereinbefore mentioned being passed in the present session of Parliament, the said Company shall, *before they shall enter* upon any part of the lands of the said Sir T. R. G." (plaintiff), "pay to the said Sir T. R. G., his heirs or assigns, the sum of 4900*l.*, purchase-money, for any portion of his lands, not exceeding 43 acres, which the said Company may, under the powers of their Act, require and take for the purposes of this undertaking. In addition to purchase-money as aforesaid, the said Company shall pay to the said Sir T. R. G., his heirs or assigns, *before they shall enter* upon any part of the said land, the sum of 7100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding 43 acres to be taken by them."

Held: 1. That the Company were not bound to pay either of these sums unless they entered upon some part of the plaintiff's lands.

2. That an absolute covenant by the Company to pay these sums to the plaintiff, in a reasonable time after the passing of the Act, would have been ultra vires, and void.

COVENANT. The declaration stated that, after the passing of "The *458] Newmarket and Chesterford Railway Act, 1846," and before the passing of "The Newmarket and Chesterford (Bury Exten-

sion and Ely Branch) Railway Act, 1847,"(a) and also before the passing of "The Newmarket and Chesterford (Thetford Extension) Railway Act, 1847," to wit, on, &c., by articles of agreement then made between the defendants, by their then style and title of "The Newmarket and Chesterford Railway Company," of the one part, and the plaintiffs of the other part, "one part of which said articles," &c. (profert), reciting that it was proposed by the Newmarket and Chesterford Railway Company to construct and maintain a railway from their railway at Newmarket in the county of Cambridge, to Bury St. Edmonds in the county of Suffolk, with a branch therefrom to the city of Ely, and, for the purpose of carrying such proposal into effect, the said Newmarket and Chesterford Railway Company were then promoting a bill which had been introduced into the Commons House of Parliament and read a second time, intituled "A bill to enable The Newmarket and Chesterford Railway Company to extend their line of railway to Bury St. Edmonds, with a branch to the city of Ely;" and that, according to the plans deposited with the clerks of the peace for the counties through which it was proposed to form the said railway, it appeared that, if made, it would pass through the lands of the plaintiff, situate in, &c.: that the plaintiff, being apprehensive that great injury would be done to his property if the said line of railway were to be made as in the said plans delineated, and more particularly if deviations were made therefrom in certain places to the extent of the limits of deviation marked on the said plans, had caused intimation of his intention to oppose the said bill to be given to the promoters thereof; and *that the said Company were desirous to come to an agreement with the plaintiff, upon the terms hereinafter expressed; the [459 said Company, for the considerations therein mentioned, did covenant and agree with the plaintiff that, in the event of the said bill thereinbefore recited, and then before Parliament, being passed in the then present session of Parliament, the said Company should and would, within a reasonable time in that behalf after the passing of the said bill, and before the said Company should enter upon any part of the lands of the plaintiff situate in, &c., pay to the plaintiff, his heirs or assigns, the sum of 4900*l.*, purchase-money, for any portion of his lands, not exceeding forty-three acres, which the said Company might, under the powers of their Act, require and take for the purposes of their undertaking: and further that, in addition to such purchase-money as aforesaid, the said Company should and would, within a reasonable time in that behalf after the passing of the said bill, and before they should enter upon any part of the said lands, pay to the plaintiff, his heirs or assigns, the sum of 7100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them; and that the

(a) See p. 460, post.

Company should, at their own expense, settle all claims and demands which the plaintiff's tenants might be entitled to make or demand in consequence of the said undertaking. The declaration then, after setting out certain other covenants between the plaintiff and the Company, averred that the said Company, after the passing of the said Act of parliament firstly above mentioned, to wit, on, &c., did make and construct *460] the railways and works by the said first-mentioned Act *authorized to be made, and that the said bill in the said articles of agreement mentioned did pass and become law in the session of Parliament present at the time of making the said articles of agreement, to wit, on, &c., and became and was and is "The Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847," (a) above-mentioned; and that the plaintiff always, from the time of making the said articles of agreement, was ready and willing to accept and receive from the defendants the said sum of 4900*l.* as the purchase-money for any portion of his the plaintiff's said lands in the said articles of agreement in that behalf mentioned, not exceeding forty-three acres, which the defendants might, under the powers of their last-mentioned Act, require and take for the purposes of their undertaking in and by the same Act authorized; and that the plaintiff was always, from the time of making the said articles of agreement, ready and willing to accept and receive from the defendants, in addition to the said purchase-money, the said sum of 7100*l.* in the said articles of agreement mentioned, as landlord's compensation for the damage arising and to arise to the plaintiff's estate in the said articles of agreement mentioned by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them according to the true intent and meaning of the said articles of agreement; that a reasonable time after the passing of the last-mentioned Act for the defendants to pay to the plaintiff the said two *461] sums of money above mentioned respectively had elapsed *before the commencement of this suit; and that the plaintiff was always, from the time of the making of the said articles of agreement, ready and willing and able to convey and assure to the defendants all such portions of his said lands in the said articles of agreement mentioned, not exceeding forty-three acres, as the defendants might, under the powers of the last-mentioned Act, require and take for the purpose of their said undertaking by the same Act authorized; of all which premises the defendants, after the making of the said articles of agreement, to wit, on, &c., and always from that time until the commencement of this suit, had notice; and that the defendants, after the passing of the last-mentioned Act, and before the commencement of this suit, to wit, on, &c., were requested by the plaintiff to pay to him the said two

(a) 10 & 11 Vict. c. xii. (Local and personal, public). Royal Assent 8th June, 1847. By sects. 35, 36, the compulsory powers for the purchase of land are to expire in three years, and the powers for completing the works are to expire in five years from the passing of the Act.

sums of money respectively; that the plaintiff, after the passing of the last-mentioned Act, and before the commencement of this suit, to wit, on, &c., did give notice to the defendants that he was ready and willing to convey and assure, and did then offer to convey and assure, to the defendants all and every such portion and portions of his said lands in the said articles of agreement mentioned, not exceeding forty-three acres, as they the said defendants might, under the powers of the last-mentioned Act, require and take for the purposes of their said undertaking by the same Act authorized; and that a reasonable time for the said Company to select and take such portions of the plaintiff's said lands for the purposes in that behalf aforesaid elapsed before the commencement of this suit; yet the defendants had not paid to the plaintiff the said two sums of money, or either of them, or any part thereof.

The defendants set out the articles of agreement upon *oyer, [462 which, after the recitals stated in the declaration, contained, among others, the following covenant. "In the event of the bill hereinbefore mentioned being passed in this present session of Parliament, the said Company shall, *before they shall enter* upon any part of the lands of the said Sir Thomas Rokewood Gage in the said county of Suffolk, pay to the said Sir T. R. Gage, his heirs or assigns, the sum of 4900*l.*, purchase-money, for any portion of his lands, not exceeding forty-three acres, which the said Company may, under the powers of their Act, require and take for the purposes of their undertaking: That, in addition to purchase-money as aforesaid, the said Company shall pay to the said Sir T. R. Gage, his heirs or assigns, *before they shall enter* upon any part of the said land, the sum of 7100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them." The defendants then pleaded several pleas, of which the last was "that the extended line of railway and works mentioned in the said articles of agreement, and in 'The Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847,' and thereby authorized to be made, hath not, nor hath any part thereof, been made or constructed, or begun to be made and constructed; and that the defendants have not required or taken for the purposes of their said undertaking, or otherwise, any part of the plaintiff's said lands in the said agreement mentioned, or any lands or tenements of the plaintiff whatsoever; nor have they the defendants ever given any notice of requiring or taking any of the said lands in the said articles of agreement mentioned, or any lands or tenements of the plaintiff; nor have they ever agreed with the plaintiff, or any person or persons, for the *purchase or taking of any such lands or tenements as afore- [463 said, otherwise than by the said articles of agreement." Veri- fication.

General demurrer. Joinder.

Joseph Addison, for the plaintiff.—First, the declaration is good. The considerations for the performance of the covenant by the defendants are, first, the passing of the bill before Parliament; in fact the absence of opposition by the plaintiff, which was held, in *Lord Howden v. Simpson*, 10 A. & E. 793 (E. C. L. R. vol. 37), (a) to be a good consideration; and, next, the giving up of the land by the plaintiff, when he should be required so to do. The first consideration has been executed; the second the plaintiff is bound to perform when called upon; and the defendants are now bound to pay for the land, upon the principle laid down in *Pordage v. Cole*, 1 Wms. Saun. 320 c. note (4), (8th ed.), that “where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for the breach of the covenant on the part of the defendant, without averring performance in the declaration.”

Next, the plea is bad. The taking and entering upon the land is not a condition precedent to the performance of the defendants’ covenant; and therefore the fact that the Company have not chosen to exercise their powers under the Act is no answer to the plaintiff’s claim. *Pilbrow v. Pilbrow’s Atmospheric Railway Company*, 5 Com. B. 440 (E. C. L. R. vol. 57), and *Webb v. The Direct London and Portsmouth Railway Company*, 9 Hare, 129, are in point. And in the *464] latter case it was held that the expiration, by lapse of time, of the compulsory powers of a railway company to take land, does not release them from the obligations with respect to the purchase of land which they have contracted during the existence of those powers. Here the whole language of the covenant shows that the defendants intended to make the railway, and enter upon some portion of the plaintiff’s land, and pay for it, within a reasonable time in the course of the five years allowed them by the Act for the completion of their works. *Bland v. Crowley*, 6 Exch. 522,† is also an authority for the plaintiff, at all events as regards the breach there averred, by non-payment of a stipulated sum as compensation for damage to arise to the plaintiff’s estate by the construction of the railway. [CROMPTON, J.—In that case there was no qualification of the covenant. Here the covenant seems to be controlled by the words “before they shall enter.”] *Preston v. The Liverpool, Manchester, and Newcastle upon Tyne Junction Railway Company*, 1 Sim. N. S. 586, 598, is, at all events, a case of precisely the same character as the present; and the observations of the Vice-Chancellor, in giving judgment, show that the meaning of the agreement, in both that case and the present one, was that the Company should pay the stipulated sums as the price of the

(a) Exch. Ch., reversing the judgment of Q. B. Judgment of Exch. Ch. affirmed in Dom. Proc. *Simpson v. Lord Howden*, 9 Cl. & Fin. 61.

plaintiff's assent and of so much of his land as should be required for the railway (including compensation for damage), whatever might ultimately be the amount of land, if any, so required. The defendants, therefore, having had the benefit of the agreement, are bound to pay the money *whether they choose to enter upon the lands or not, [*465 and, if they do so choose, before they enter. The stipulation, that the money is to be paid before entry, is introduced into the agreement for the purpose of protecting the plaintiff, not of giving the defendants the option of paying or not.

Bramwell, contra.—First, the plea is good. By the terms of the agreement it is clear that no money is to be paid by the defendants until the land is taken by them. And they are not bound to take it. The declaration does not aver the not taking of the land as a breach; the only breach is the non-payment of the two sums of money for purchase and compensation. But the defendants are not obliged to pay if they do not take; all they agree to do is, if they enter, to pay first. It would be most unreasonable to adopt the plaintiff's construction. The agreement was evidently intended as a substitute for the usual arrangements under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18; and, under sect. 84 of that statute, entry upon the land by the Company is clearly necessary to entitle the landowner to the purchase-money. The fact is that a case has arisen which the parties to the agreement probably did not contemplate; but, under these circumstances, the defendants are not to be made liable for a state of things not provided for in the contract. The agreement alone can be looked at: and the fact that it contains no covenant by the plaintiff to convey, and no covenant for title, strongly favours the conclusion that it was not intended to make the taking of the land imperative upon the defendants. It recites, moreover, that, if the railway is made, injury will be caused to the plaintiff's estate; and *therefore does not treat [*466 the construction of the railway as certain. It has been contended that the words "before they shall enter" were introduced merely for the purpose of protecting the plaintiff from entry by the Company before payment. If so, the natural deduction is, that the payment is in consideration of the entry, and is not to be made if that consideration does not take effect. The sum by way of compensation for damage, moreover, is to be paid in respect of "the severance" of the plaintiff's land. The land, therefore, must be entered upon by the Company before such compensation is payable. The reasoning of Parke, B., in *Bland v. Crowley*, 6 Exch. 522, 530,† shows that neither of the breaches in this declaration can be sustained. The learned Judge says: "If no land should be required, the stipulated price would not be payable, and as none was required, the defendants cannot be called upon to pay any part of the price." That is the state of things in the present case. The decision in *Webb v. The Direct London and*

Portsmouth Railway Company was much shaken when it came before the Lords Justices. (a) Lord Justice Cranworth there says that the breach ought to be the not taking the land. And the opinion there expressed was acted upon by the same Court in a similar case, *Lord James Stuart v. London and North-Western Railway Company*, 1 De G., Macn. & Gord. 721.

Next, the declaration is bad. It alleges an agreement by the defendants to pay within a reasonable time, which had elapsed. Now a *467] reasonable time for that *purpose cannot elapse until the defendants require to take; and they may do so at any time within five years from the passing of their special Act, a period which has not yet expired.

Further, the agreement itself is invalid. It is ultra vires on the part of the defendants. At the time when it was entered into, they were incorporated only as a Company for making a railway from Newmarket to Chesterford, and therefore had no power to make any contract except for the purposes of that particular undertaking, or to agree for the purchase of land which they might never have the legislative authority for taking; *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 11 Com. B. 775 (E. C. L. R. vol. 73). [Lord CAMPBELL, C. J.—In *Lord Howden v. Simpson*, 10 A. & E. 793 (E. C. L. R. vol. 37), the agreement was made before the special Act was passed.] There, as in all cases where a similar agreement has been held good, the contract was made with some individual competent to contract, and was afterwards sanctioned by the Company.

J. Addison, in reply.—The contract here is not beyond the scope of the Company's powers, as in the *East Anglian Railways Company v. The Eastern Counties Railway Company*. [Lord CAMPBELL, C. J.—The Company agree to pay a certain part of the funds of the shareholders for what they may not, and eventually do not, require. If they pay even though they do not enter, surely that is a misappropriation of the funds.] Such a bargain might be advantageous for the general objects of the Company; it is, in fact, buying the power to purchase *468] land if they like. That buying is legalized *by the passing of the special Act. The analogy suggested, between the provisions of the agreement and those of sect. 84 of the Lands Clauses Consolidation Act, is in favour of the plaintiff; for under that section the Company would clearly be liable to be sued upon the agreement or the award, even though they had not entered. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a subsequent day in this term (May 3d), delivered the judgment of the Court.

We are of opinion that the defendants are entitled to our judgment. Taking the deed as set out on oyer, we think that there is no breach

(a) *Webb v. The Direct London and Portsmouth Railway Company*, 1 De G. Macn. & Gord. 821.

well assigned upon it. The covenant there (without saying anything, as the declaration does, about "reasonable time") is merely in these words: "That, in the event of the bill hereinbefore mentioned being passed in the present session of Parliament, the said Company shall, *before they shall enter upon any part of the lands of the said Sir Thomas Rokewood Gage* in the said county of Suffolk, pay to the said Sir T. R. G., his heirs or assigns, the sum of 4900*l.*, purchase-money, for any portion of his lands, not exceeding forty-three acres, which the said Company may, under the powers of their Act, require and take for the purposes of their undertaking: That, in addition to purchase-money as aforesaid, the said Company shall pay to the said Sir T. R. G., his heirs and assigns, *before they shall enter upon any part of the said land*, the sum of 7100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them." The question we have to determine is, *whether, the Company never having entered upon any part of the plaintiff's lands, he is now entitled to sue for [*469 these two sums or either of them.

The 4900*l.* is declared to be the purchase-money for the land to be required and taken; and the only time of payment mentioned is, before the Company enter on the land. Therefore, if no land is required or taken, and the Company never enter on any part of the land, there seems great difficulty in saying that there has been a breach of covenant in not paying the money. So, the 7100*l.* is declared to be a compensation for severance of the land taken from the rest of the plaintiff's land; and the same time of payment is defined: but there has been no severance to be compensated; and the time for payment has not accrued.

This deed does not bargain for a sum of money to be paid absolutely by the Company to the plaintiff as a consideration for his withdrawing his opposition to the bill, but provides a peculiar mode of estimating the value of the land to be taken, and of the compensation to be made for severance damage, instead of the modes pointed out by the general Acts upon this subject. We therefore do not think that the Company can be considered as having absolutely covenanted to pay 12,000*l.* to the plaintiff in a reasonable time after the passing of the Act.

If this deed could bear such a construction, we should have thought it so far ultra vires and void. Here the railway Company are the covenantors; and, if the present action lies, the capital paid up by the shareholders must be answerable for the damages to be recovered. We consider that this would be a misappropriation of the funds of the Company, which the directors could not lawfully make.

*All the cases relied upon by the plaintiff's counsel are clearly distinguishable from the present, except *Webb v. The Great Northern & Portsmouth Railway Company*, 9 Hare, 129, before Vice- [*470

Chancellor Turner. Notwithstanding our high respect for that learned Judge, we cannot concur in the reasons for his decision; and, although it has not been expressly overturned, its authority was greatly shaken when it came before the Lords Justices of Appeal.(a)

We do not feel it necessary to give any opinion upon the case of *Bland v. Crowley*, 6 Exch. 522,† in which the learned Judges of the Court of Exchequer were divided; as the deed there discussed varies materially from the present. Nor would it be proper to give any opinion upon *Stuart v. London & North Western Railway Company*, 1 De G. Macn. & Gord. 721, as we learn that, when it came before the Lords Justices of Appeal, it was sent by them to be decided in a Court of law.

We are happy to think that, the question in this case being on the record, it may be brought before a Court of error. In the mean while there must be judgment for the defendants.

Judgment for defendants.(b)

(a) *Webb v. The Direct London and Portsmouth Railway Company*, 1 De G. Macn. & Gord. 521.

(b) See *M'Gregor v. Dover and Deal Railway, &c., Company*, post; *Mayor of Norwich v. Norfolk Railway Company*, 4 E. & B. 397 (E. C. L. R. vol. 82).

*471] *LLOYD v. JOHN EDWARD OLIVER. May 4.

An instrument was drawn in the following form: "Two months after date I promise to pay to T. R. L." (plaintiff) "or order 99l. 16s. H. Oliver." Underneath was written, on the left hand of the instrument, "J. E. Oliver" (defendant). Across it was written "accepted, payable S. & Co., Bankers, London. E. Oliver." "E. Oliver" was signed by defendant.

Held, that the instrument might be sued upon as a bill of exchange drawn by H. Oliver upon, and accepted by, defendant.

Per Lord Campbell, C. J. Such an instrument would be good as a bill of exchange, as against the drawer, even before acceptance.

THE first count of the declaration stated that one Henry Oliver, on 17th July, 1851, made his bill of exchange in writing, and delivered it to defendant, and thereby required defendant to pay to plaintiff 99l. 16s. two months after the date thereof, which period had elapsed before the commencement of this suit; and that defendant accepted the same and promised plaintiff to pay the same according to the tenor and effect thereof.

There was a second count, claiming the same sum on an account stated.

Pleas: 1. That defendant did not accept the bill of exchange in the first count mentioned, in manner and form, &c. Issue thereon.

2. To the second count: Non assumpsit. Issue thereon.

On the trial, before Erle, J., at the London sittings in last Trinity Term, the following document was put in evidence by the plaintiff.

"London, July 17th, 1851.

£99 : 15s.

Two months after date I promise to pay to Mr. T. R. Lloyd or order the sum of ninety-nine pounds fifteen shillings for value received.

John Edward Oliver.

HENRY OLIVER.

Birmingham."

Across this was written: "Accepted, payable Spooner, Attwood & Co., Bankers, London. EDWARD OLIVER."

It was proved that "Edward Oliver" was the signature of the defendant.

*It was objected, for the defendant, that this document was not a bill of exchange. The learned Judge was of opinion that it [472 might be declared upon as such, and directed a verdict for the plaintiff, leave being reserved to move to enter a verdict for the defendant.

J. Gray now moved accordingly.—In *Edis v. Bury*, 6 B. & C. 483 (E. C. L. R. vol. 13), a document like this was held to be not a bill of exchange but a promissory note. [Lord CAMPBELL, C. J.—What the Court there held was that it might be treated as a promissory note, if the holder choose.] *Littledale, J.*, there said that it could not be a bill of exchange. [Lord CAMPBELL, C. J.—The document here says, in effect, I will pay if the party to whom this is addressed does not accept, or if he does not pay after he has accepted. It is a bill of exchange containing that additional promise to the payee.] There are no words of request; it cannot be said that merely putting John Edward Oliver's name at the bottom of the document is a request to him by the maker of the instrument to pay. [Lord CAMPBELL, C. J.—I do not see what else it can mean. *CROMPTON, J.*—The acceptance, at all events, shows the meaning of John Edward Oliver's name being at the bottom of the instrument.] Even if that were so, the instrument could not be a bill of exchange, or anything but a promissory note, until it had been accepted; but the declaration treats it as if it were a bill of exchange at the time of the making.

Lord CAMPBELL, C. J.—I am of opinion that this instrument, even before acceptance, might be treated as a bill of exchange as against Henry Oliver, the drawer. *As against the defendant it is [473 clearly a bill of exchange. It is directed to John Edward Oliver; that must mean that John Edward Oliver is requested to pay the sum mentioned at two months after date, although there are no express words of request. The words "I promise to pay" need not be rejected; they are to be considered as an expression of what otherwise would be implied, namely, that the maker will pay if the acceptor do not. The instrument is ambiguous, and might, no doubt, if the plaintiff chose, be treated as a promissory note. That is the effect of the decision in *Edis v. Bury*.

ERLE, J.—As against the defendant, this instrument is clearly a bill

of exchange. We must construe the language of it according to known mercantile usage. It has always been the custom, in drawing bills of exchange, to place the name of the party to whom the bill is directed in that part of the instrument where, in the present case, the name of John Edward Oliver, the defendant, is placed. According to the same rule, the word "accepted," followed by a signature, as in the present instrument, implies acceptance of the bill by the party signing. I recollect that it was proved at the trial that the instrument had never been out of the hands of the parties to it until it was in its present form: so that it never could have been simply a promissory note, as has been suggested. It is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or as a bill of exchange.

*474] CROMPTON, J.—The instrument contains, in my *opinion, a clear direction to John Edward Oliver to pay, and a clear acceptance by him. It is, therefore, a bill of exchange. But it has been decided, and it is most important that the decision should not be impeached, that equivocal instruments of this kind, possessing the character both of promissory notes and of bills of exchange, may be treated as either.

Rule refused.(a)

(a) Wightman, J., was absent.

WILSON v. EDEN and Others. May 4.

Testator, by his will, made in 1815, but confirmed by a codicil in 1841 (see stat. 1 Vict. c. 26, s. 34), after directing payment of his debts and funeral and testamentary expenses, and giving certain annuities, with which he charged his real estate, and certain legacies, bequeathed "all the rest, residue, and remainder" of his "personal estate, goods, and chattels, whatsoever and wheresoever," to his brother M. "absolutely to and for his own use and benefit." He then devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being at or near," &c., in the county, &c., "and a parcel of land purchased by me" of M. L. at, &c., in the county, &c., "and all other my real estates in the said counties of," &c., "and elsewhere in Great Britain, and all my estate and interest therein," to trustees, to hold the same (subject to the said annuities) to the use of his said brother M. for life, remainder to the issue of the said M. in tail male; in default of such issue, to W. E. and his heirs.

At the time of making his will and at his decease, testator was possessed of freehold estates in both the said counties, and of lands held under certain church leases in one of them, which had been, according to the usual practice of the lessors, renewed every seven years. These leaseholds were distinct from, but near, and, in some places, contiguous to, the freeholds; some of them were let and occupied with the freeholds, at undivided yearly rents. Cottages, ornamental and otherwise, were built upon part; and on part were buildings occupied by labourers employed upon the freehold estates.

Held, that, under stat. 7 W. 4 & 1 Vict. c. 26, s. 26, the leasehold estates in question passed under the general devise of the realty; there being no contrary intention apparent on the will.

By order of the Master of the Rolls, the following case was stated for the opinion of this Court.(a)

(a) The same case had been previously sent for the opinion of the Court of Exchequer. See *Wilson v. Eden*, 11 Beav. 237, 253; and *Wilson v. Eden*, 5 Exch. 752.†

Sir Robert Johnson Eden, late of Windlestone in the county of Durham, duly made and published his will, *dated 14th April, 1815; and, [*475 after directing the payment of all his debts, funeral and testamentary expenses, and after giving certain annuities (with the payment of which he charged his real estates), and after giving certain legacies, he thereby gave and bequeathed as follows: "I give and bequeath all the rest, residue, and remainder of my personal estate, goods, and chattels, whatsoever and wheresoever, after and subject to the payment of my just debts, funeral and testamentary expenses, and the said legacies and bequests (except the said annuities) hereinbefore by me given as aforesaid, and all my estate and interest therein, unto my brother, Morton John Davison, Esq., late Morton John Eden, absolutely, to and for his own use and benefit." And the said testator gave and devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Brignal in the county of York, and a parcel of land purchased by me of the late Mrs. Mary Lambton at Romanby, near North Allerton, in the North Riding of the county of York, and all other my real estates in the said counties of Durham and York, and elsewhere in Great Britain, and all my estate and interest therein, unto Robert Eden Duncombe Shafto, of Whitworth, in the county of Durham, Esq., William Nesfield, of Brancepeth, in the county of Durham, Clerk, and Thomas Hopper, of the city of Durham, Esq., and their heirs, subject to the said annuities so given and devised as aforesaid; to hold the same unto the said R. E. D. Shafto, W. Nesfield, and T. Hopper, and their *heirs, subject as aforesaid, to and for [*476 the several uses, upon the trusts, and to and for the intents and purposes, and under and subject to the powers, provisoes, declarations, and limitations, hereinafter limited, declared, or expressed of and concerning the same, that is to say: To the use of my said brother, the said Morton John Davison, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste: And, from and immediately after the determination of that estate by forfeiture or otherwise in his lifetime, then to the use of the said R. E. D. Shafto, W. Nesfield, and T. Hopper, and their heirs, during the life of the said Morton John Davison, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion shall require; but nevertheless to permit and suffer the said Morton John Davison and his assigns, during his life, to receive and take the rents, issues, and profits of the said hereditaments and premises, to and for his or their own use and benefit: And, from and immediately after his decease, to the use of the first son of the said Morton John

Davison, lawfully begotten, and of the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the said Morton John Davison, lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, *477] being always to be preferred and *take before the younger of such sons and the heirs male of his and their body and bodies: And, in default of such issue, to the use of Sir William Eden, Bart., his heirs and assigns for ever." And the said testator thereby constituted and appointed the said Morton John Davison executor of his said will.

The testator afterwards signed and published a testamentary paper, bearing date the 9th March, 1835, purporting to be a codicil to his said will, and containing certain additions to, and alterations of, the annuities bequeathed by his said will, but not in any other manner affecting such will.

Morton John Davison, the brother of the testator and the sole executor named in the will, died on the 28th June, 1841, in the lifetime of the said testator, and without ever having had any issue; and, after his death, the testator duly signed and published another codicil to his said will, in the words and figures following:—"This is a codicil to the last will and testament of me, Sir Robert Johnson Eden, of Windlestone, in the county of Durham, Bart., which will is dated the 14th day of April, 1815. Whereas, by my said will, I appointed as the executor thereof my late only brother Morton John Davison, Esq., who died on the 28th day of June last: Now I do, by this codicil, appoint my nephew John Methold, Esq., the sole executor of my said will: And I hereby ratify, confirm, and republish my said will. As witness my hand, this 10th day of July, 1841. ROBERT JOHNSON EDEN." (Then followed the attestation.)

The said John Methold afterwards took the name of Eden, instead of Methold.

The testator died on the 3d September, 1844, without having revoked *478] or altered his said will, except so far as *the same was altered by the said codicils thereto, and without having revoked or altered the said codicils, or either of them. And the said will and codicils have since been duly proved by the said John Eden, the executor thereof.

The testator was, at the time of his death, possessed of several leasehold estates in the townships of Merrington and Middlestone, both now in the parish of Merrington, in the county of Durham, held under various leases from the Dean and Chapter of Durham for terms of twenty-one years respectively, a part of which leasehold estates was acquired

by the testator's father, in the year 1772, and the remaining portions thereof had been acquired by his said father or himself at various times since. (The case then set out the dates of the several purchases.) And the Dean and Chapter of Durham have hitherto renewed the leases under which the said estates were held at the end of every seven years, according to their usual custom with respect to property held under leases from them; but the leases contained no covenant on their part to do so.

In the year 1833 the Dean and Chapter of Durham demised the coal mines under the said leasehold estates, and other adjoining lands, with power to erect cottages and make a railway: and several cottages have accordingly been erected, and a railway made through part of the said leasehold estates. The testator was not, at the time of his death, possessed of or entitled to any leasehold estates for years, except in the townships of Merrington and Middlestone.

The township of Middlestone was heretofore in the parish of St. Andrew Auckland, but was, on the 26th April, 1845, annexed to the said parish of Merrington.

*The parish of Merrington is intersected by a high ridge of hills, ranging east and west, upon the summit of which the church and village of Merrington are situated; and the greater portion of the said leasehold estates (to the extent of 539 acres, or thereabouts) lie to the south of the said ridge, and extend to and (for about 2050 yards) abut on the northern boundary of the freehold manor and estate of the testator, in the township of Windlestone, heretofore in the parish of St. Andrew Auckland, but now forming part of the new parish of Counden, which was made a parish in the year 1842, and adjoin the said freehold estate of Windlestone, but are in part separated therefrom by a turnpike road, and in part by the ordinary hedges of the country, through which are necessary communications for those tenants who hold both freehold and leasehold in the same farm; and in some instances the leaseholds were let and occupied with the said freeholds, at undivided yearly rents.

The said leasehold estates are not intermixed with, or surrounded by, the freehold lands of the said testator at Windlestone; but, with the exception of one plot, containing about 18 acres, they lie together, and part of them are about a quarter of a mile from the mansion of Windlestone; but the turnpike road between Bishop's Auckland and Rushyford lies between them and the said mansion. The remainder of the said leasehold estates, containing about 72 acres, lie on the northern side of the aforesaid ridge, and about two miles from the said testator's freehold mansion and estate at Windlestone.

The testator was, at the respective dates of making his will and of his death, seised of or entitled to not only the said freehold manor and

*480] estate of Windlestone *(which comprises the whole township of Windlestone, and contains 1182 acres 2 roods 29 perches), but also two closes of freehold land immediately adjoining the said Windlestone estate, and situate in the township of Counden, and containing together about 16 acres, and the freehold tithes thereof: and also some detached portions of freehold lands in the said township of Merrington, and containing together about 106 acres; and the freehold tithes of parts of the said leasehold estates in Merrington and Middlestone; an estate in the township of West Auckland, chiefly freehold and copyhold, with the freehold tithes thereof; and two leases for lives, containing together 1162 acres or thereabouts; and freehold lands in the township of Saint Helen's Auckland, containing 381 acres or thereabouts; of two freehold fields, containing together about 19 acres, in the township of Bondgate in Auckland; and of a freehold messuage in the city of Durham: but which said freehold fields and messuage were afterwards sold by the testator in his lifetime.

The said freehold mansion and estate of Windlestone have been in the possession, and the residence, of the family of the said testator for upwards of one hundred years; and there are several cottages (some of which are ornamental) and other buildings standing upon that part of the said leasehold estates which is nearest the said mansion; and which buildings, consisting of three cottages called Well Houses, were, in the lifetime of the testator, occupied by persons employed about the said mansion and estate at Windlestone; and the said testator, during his life, expended upwards of 40,000*l.* in rebuilding or restoring the said mansion and premises.

*481] On the 20th February, 1845, Eleanor Wilson, one of *the sisters and next to kin of the said testator, filed her bill in the Court of Chancery against John Eden, the executor of the testator, and the said Sir W. Eden and others, praying (amongst other things) that it might be declared that the said testator died intestate as to his leasehold estates, and that an account might be taken of the same and of the rents and profits thereof, &c.

The case then stated that, on the cause being tried before the Master of the Rolls, his Lordship directed a case to be sent to this Court, submitting the following question for their opinion:

Whether the leasehold estates, of which the testator, Sir Robert Johnson Eden, died possessed, passed under the devise in his will of all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, and arising, or being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Brignal, in the county of York, and all other his real estates in the said counties of York and Durham, and elsewhere in Great Britain, and all his estate and interest therein.

The will and codicils of the said testator were to form part of the case.

Sir *Fitzroy Kelly*, for the plaintiff.—The question for the Court is, whether the leasehold estates passed to the trustees under the devise of the realty, or, as the plaintiff contends, to the testator's brother under the previous bequest of the personalty. That question raises three points: first, how the leaseholds would have passed before stat. 7 W. 4 & 1 Vict. c. 26; secondly, whether, the will *having [*482 been revived and brought within the scope of that Act, under sect. 34, by the codicil in 1841, the description of the realty in the will is such a description as is intended by sect. 26; thirdly, whether, if it be, the proviso in that section, with respect to a contrary intention appearing by the will, applies here.

As to the first point: it was laid down in *Rose v. Bartlett*, Cro. Car. 292, that, "if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years: and if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void." And this rule has been recognised and acted upon up to the passing of stat. 7 W. 4 & 1 Vict. c. 26. The leaseholds in the present case, therefore, would not have passed, the testator having also freehold lands to which the description would apply. In *Thompson v. Lady Lawley*, 2 Bos. & P. 303, the Court decided according to the rule laid down in *Rose v. Bartlett*. *Addis v. Clement*, 2 P. Wms. 456, *Lane v. Earl Stanhope*, 6 T. R. 345, *Day v. Trig*, 1 P. Wms. 286, and *Lowther v. Cavendish*, Amb. 356,^(a) will probably be cited on the other side. But in all those cases, as *Heath, J.*, with reference to the two first, observed in *Thompson v. Lady Lawley*, 2 Bos. & P. 318, there were special circumstances from which the intention of the testator that the personalty should pass under the general devise could be collected. In *Addis v. Clement* the testator devised all his lands which he was seised or "possessed of, or any ways interested in;" and this last *description was held to refer to [*483 the leaseholds. In *Lane v. Stanhope*, and *Lowther v. Caven-* dish, the word "farms," and the words "lands, tenements," "mines," and "rents," were respectively held, in the particular cases, to indicate leasehold property. In *Day v. Trig*, where the testator devised "all" his "freehold houses," he had none but leasehold property; so that the second part of the rule in *Rose v. Bartlett* applied. In the present case not only is there nothing, in this devise, to indicate an intention that the leaseholds should pass under it, but a marked separation and distinction is made, in the other parts of the will, between the two descriptions of property, which are settled in two different ways. *Arkell v. Fletcher*, 10 Sim. 299, is directly in point for the plaintiff; and

(a) S. C., more fully, 1 Eden, 99.

Pistol v. Riccardson, 2 P. Wms. 459 (note (1)), is an authority to the same effect.

As to the second point: stat. 7 W. 4 & 1 Vict. c. 26, s. 26, enacts that "a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the *484] case may be, as well as freehold estates, *unless a contrary intention shall appear by the will." But that section applies only to cases where there is but one general devise of the landed property, not where, in addition to such devise, the real property and the personal property are expressly left to different persons. Here, moreover, in the very devise in question, the words "and all *other* my *real* estates," &c., define the character of the property devised, and prevent the description from being such as would describe a leasehold estate if there were no freehold to which it was applicable. [Lord CAMPBELL, C. J.—I do not think it is clear that the words "real estates" might not apply to leaseholds.]

As to the third point: the will itself clearly shows an intention that the leaseholds shall not pass under the general devise, and therefore the proviso at the end of sect. 26 applies. In the first place, the testator begins by leaving all his personal estate, after payment of his debts and funeral expenses, to his brother, in terms so distinct and technical that they must rebut any inference of a contrary intention which might possibly be drawn from the terms of the subsequent devise. In *Davis v. Gibbs*, 3 P. Wms. 26, a distinct bequest of this kind was held to afford a strong presumption against such a construction of another part of the will as would alter the disposition of part of the personal property. The language of the will here shows that it was framed by some person thoroughly acquainted with the effect of legal phrases; and, if he had intended to pass the leaseholds under the devise of the realty, he would have used clear and unmistakeable words of conveyance to that effect. *Here, moreover, if the leaseholds were *485] held to pass under the general devise, the consequence would be, that the first tenant in tail would take an estate tail in the freeholds, and would take the interest in the leaseholds absolutely. The words of limitation are clearly not intended to effect this. They are applicable to freehold property only. And the real estates are made subject to the payment of certain annuities, which is a strong argument that the freehold lands only are meant. Further, the situation of all the freehold estates is expressly described in the devise: but the lease-

holds, which are in the parish of Merrington, and distinct from the freehold property at Windlestone and elsewhere, are not described at all. It is highly improbable that, if the testator had intended the leaseholds to pass with the other landed property, he would not have described them as explicitly as the other portions of his estates.

Malins, contra, was not called on.

Lord CAMPBELL, C. J.—I have read most carefully the case submitted to us, as well as the judgment of Lord Langdale (a) and of the Court of Exchequer; (b) and I have heard with great pleasure the able argument on behalf of the plaintiff: but, as we entertain no doubt as to the construction of the will, I do not think it is necessary that we should hear the argument on the other side.

I concur entirely in the decision of the Court of Exchequer, and in the reasons which are given by *them for that decision. I express no opinion as to what would have been the effect of the [486 devise in question before the passing of stat. 7 W. 4 & 1 Vict. c. 26; but I am clearly of opinion, though with most sincere respect for the judgment of Lord Langdale, that, under sect. 26 of that Act, the leaseholds pass under the general devise of the realty. That section enacts "that a devise of the land of the testator, or of the land of the testator in any place or in the occupation, &c." (His Lordship here read the whole clause, for which see p. 483, ante.) Now here we have a devise of the land of the testator, in a place most distinctly set out. He devises all "my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Brignal, in the county of York, and a parcel of land purchased by me of the late Mrs. Mary Lambton at Romanby, near North Allerton, in the North Riding of the county of York." It seems admitted that, if this had been the whole devise, it would have come within the operation of sect. 26. Then is it, as has been contended, taken out of the operation of that section by the subsequent words "and all other my real estate in the said counties of Durham and York, and elsewhere in Great Britain, and all my estate and interest therein?" I cannot see how this latter part of this devise affects in any way the first part, or prevents it from being a devise of the lands of the testator in a particular place.

But it is further contended, that the leaseholds do *not pass [487 under this devise, because a contrary intention appears by the will. Now, in examining whether there be such a contrary intention, I consider that we are not to look to any technicalities, but to form our conclusion from the general language of the will, looking at all such

(a) See *Wilson v. Eden*, 11 Beav. 237, 247.

(b) See *Wilson v. Eden*, 5 Exch. 752, 755.†

facts as may fairly be taken into consideration in construing it. Before the passing of stat. 7 W. 4 & 1 Vict. c. 26, the leaseholds would not have passed under such a devise as this, unless the will showed elsewhere a clear intention that they should do so; but, since the Act, a contrary intention must be positively shown, in order to prevent them from so passing. I can see no such contrary intention here. I think the testator clearly did intend that the leaseholds should pass. There is no incompatibility in this; for the leaseholds had been long in the possession of the same family, and were probably considered to form part of one and the same estate with the freeholds. It has been argued that great inconvenience would result from the first tenant in tail taking an absolute interest in the leasehold; but he takes, substantially, the same interest in the freeholds; for he has only to execute a disentailing deed to acquire precisely the same interest in those. The argument for the plaintiff has failed to convince me that there is anything in the will to indicate an intention that the leaseholds should not pass with the freeholds; and, that being so, I am of opinion that, under stat. 7 W. 4 & 1 Vict. c. 26, s. 26, they do so pass.

ERLE, J.—I also have considered the judgment of the Court of Exchequer, and am perfectly satisfied with it. I am clearly of opinion *488] that this devise is capable, *under sect. 26 of stat. 7 W. 4 & 1 Vict. c. 26, of passing chattels real as well as freeholds. The leaseholds in question, therefore, will pass, unless a contrary intention appears by the will. I cannot find any such intention; and, looking at the facts which may be taken into consideration in construing the will, I am of opinion that the testator did intend that the leaseholds should pass with the freeholds. The contiguity of the former to the latter; the unity of occupation; the fact that part of the leaseholds was let together with the freehold, that part was used for the purpose of ornamenting the mansion, which stood upon the freehold property, and that part was occupied by retainers employed upon the freehold; all these circumstances produce a conviction in my mind that the leaseholds and the freeholds were considered by the testator as one estate, and that he intended that both descriptions of property should pass together. It has been argued that the form in which the real estate is settled is inapplicable to leaseholds. No doubt it is, technically speaking; but, although we may assume, as has been suggested, that the framer of the will must have been aware that leaseholds are classed in law under personalty, it does not follow that the testator adopted that knowledge, or that either of them considered the property in question to be leasehold; they may both have thought that all the estates were held by the same tenure, and have drawn and executed the will in accordance with that view. At all events, I do not think that the argument founded on the supposed legal knowledge of the framer of the will at all countervails that inference of the testator's intention which is to be drawn from the facts I

have already mentioned; and *those facts countervail, in my opinion, any technical argument to the contrary as to the construction of the will. I am therefore of opinion that, under this devise, the leaseholds pass with the freeholds. [*489]

CROMPTON, J.—I am of the same opinion. The onus lies upon the next of kin to prove that the will shows an intention on the part of the testator that the leaseholds should not pass under the devise of the realty. That intention, in my opinion, has not been shown. We need not enter upon the question as to what would have been the effect of this devise before the passing of stat. 7 W. 4 & 1 Vict. c. 26. The form of the limitations might then have been a strong argument against the leaseholds passing. But, since the Act, they will pass, unless a contrary intention is positively shown. I am of opinion that the intention of the testator was that the leaseholds should pass with the freeholds, and that he considered the two as forming one estate. I think that the judgment of the Court of Exchequer is right; and that our certificate should be to the same effect as that which has already been sent by that Court.(a)

The following certificate was afterwards sent.

"We have heard this case argued by counsel, and are of opinion that the leasehold estates of which the testator, Sir Robert Johnson Eden, died possessed, passed under the devise in his will of 'all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being at or near Windlestone, West *Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Brignal in the county of York,' 'and all other my real estates in the said counties of Durham and York, and elsewhere in Great Britain, and all my estate and interest therein. Dated this 6th day of May, A. D. 1852. [*490]

CAMPBELL.

W. ERLE.

CHARLES CROMPTON."

(a) Wightman, J., was absent.

CASTELLI and GIUSTINIANI v. GROOM. May 5.

A commission may be granted under stat. 1 Wm. 4, c. 22, s. 4, to examine a party to a suit, resident abroad, on his own behalf. But the Court may, in its discretion, refuse such commission, if sufficient ground be not shown for requiring it.

And this Court refused a commission where the only specific ground assigned was that the parties were resident, and one carrying on business in distant places abroad (Leghorn and Constantinople), and that they made the application *bonâ fide*.

WILLES, in the present term, April 16th, obtained a rule nisi for commissions to examine the plaintiffs in this cause as witnesses upon inter-

rogatories, at Constantinople and Leghorn. By affidavits in support of the motion it appeared that the action was brought by order of the Lords Justices of the Court of Appeal in Chancery, to try the validity of an adjudication of bankruptcy pronounced against the plaintiffs in the London Court of Bankruptcy. The writ was issued January 26th, 1852; the action was trespass, against the official assignee, for taking goods; venue, Surrey; the defendant justified under the adjudication; and the plaintiffs replied *De injuriâ*: the questions to be tried were, whether there were a good petitioning creditor's debt and a sufficient *491] act of bankruptcy. One of the *affidavits (a) (by the clerk to the plaintiffs' attorney) stated: "That the acts of bankruptcy on which the said plaintiffs were respectively adjudged bankrupts were the quitting this country with intent, as it is alleged, to delay their creditors; and the sufficiency of the petitioning creditor's debt depends to a great extent upon the nature of the communications which passed between the said plaintiff Saverio Castelli and the petitioning creditors, or between him and one Peter Pasquali, as to the constitution and dissolution of a firm in which the plaintiffs had been partners down to the end of the year 1850; and the only persons who can give conclusive evidence upon these points are necessarily the said Saverio Castelli and Giovanni Baptista Giustiniani themselves: and that both the said plaintiffs are material and necessary witnesses in this action; and this deponent is advised and believes that it will not be safe to proceed to the trial of this action without the evidence of each of the said plaintiffs. And this deponent saith that the said plaintiff S. Castelli is now residing at Constantinople, and that the said plaintiff G. B. Giustiniani is now at Leghorn, where he resides and carries on his business: and this deponent believes that neither the said S. Castelli nor the said G. B. Giustiniani will be in London in time to attend the trial of this cause. And this deponent saith that this application is made *bonâ fide* and not with intent to delay the trial."

Application was made for commissions as above to Crompton, J., at chambers, on February 23d in this year. The learned Judge declined making the order; but, for the purpose of giving the plaintiffs time to *492] arrive *in England, he directed the venue to be changed from Surrey to London, and the cause to be tried by a special jury at the first sittings in the then next Easter term. No specific reason, except the distance of residence, was assigned for the non-attendance of the plaintiffs: but a letter from their attorneys to those of the defendant, set forth on affidavit, had these words: "It appears to us very unreasonable to expect that parties abroad, against whom proceedings of this nature are taken, are to be deprived of redress and of

(a) Sworn 13th February, 1852. The averments as to the residence of the plaintiffs, the materiality of their evidence, and the belief that they would not be in England in time for the trial, were repeated in an affidavit of April 16th.

the means of vindicating themselves in the Courts of this country unless they consent to come within the reach of the very parties whose hostile proceedings have given rise to the mischief of which they complain. It would amount to a denial of justice in the present case if the plaintiffs' evidence is to be excluded unless they personally appear at the trial." By an affidavit in opposition to the present rule, the defendant's attorney and one of the petitioning creditors stated their belief that there was no ground for the action, or for disputing the adjudication; "that it will not be safe for the defendant to go to trial in this cause upon any evidence to be given by the said plaintiffs unless the same be taken in court in the presence of the jury and subject to cross-examination; and that the said plaintiffs have no reasonable excuse, to the knowledge or belief of these deponents, for not personally attending the trial of this cause, nor anything to prevent them from so attending save their fear of being molested under their bankruptcy, which they are contesting." One of the deponents stated that Castelli had absconded from London, where he had a place of business, after being served with a notice in bankruptcy on deponent's behalf, and for no purpose, as deponent believed, but to avoid proceedings threatened by his creditors: and both swore that they believed the present application to have been made for delay only, and not *bonâ fide*. [*493]

Bramwell and *Karslake* now showed cause.—Conceding, for the sake of argument, that the Court can grant a commission to examine parties, like other witnesses, a reason ought to be shown for such examination, which is a departure from ordinary practice. [Lord CAMPBELL, C. J.—I should say that the rule as to examining on interrogatories ought to be general: but it would be very inconvenient if persons could bring actions, and then go abroad to avoid being examined in Court.] No ground appears on affidavit for the course proposed, except that the plaintiffs are absent, and would be inconvenienced by having to attend. It may be inferred from the observations of Wightman, J., in *Carruthers v. Graham*, 9 Dowl. P. O. 947, that reasons of this kind will not induce the Court to order an examination on interrogatories where the witness might be questioned *vivâ voce*. Any difficulty from the length of time which would be requisite to enable these parties to attend was removed by the order at chambers.

Willes, *contra*.—No reason is shown on affidavit against the proposed examination. [Lord CAMPBELL, C. J.—The onus lies on you, of showing that the commission is necessary to the due administration of justice.] The Court ought to allow such a proceeding, if the parties have not disentitled themselves to it. [Lord CAMPBELL, C. J.—Is it enough to show simply that the person is out of the jurisdiction of the Court; at *Boulogne for instance?] When the Act, 1 W. 4, c. 22, enabling Courts to order examination upon interrogatories elsewhere than [*494] in India, passed, persons who had an interest could not have given

evidence in any form ; and for that reason parties could not have been examined on interrogatories. *Worrall v. Jones*, 7 Bing. 395 (E. C. L. R. vol. 20), commented upon in 2 Taylor on Evidence 872,(a) shows that the exclusion would have rested on this and no other ground. But, since the disability of interested persons, and, finally, of parties themselves, has been removed, by stats. 3 & 4 W. 4, c. 42, s. 26, 6 & 7 Vict. c. 85, s. 1, and 14 & 15 Vict. c. 99, s. 2, parties, equally with any other persons, may be examined under stat. 1 W. 4, c. 22, s. 4; and the enactment is of a class in which permissive words are deemed imperative, on the principle laid down in *Rex v. The Steward, &c., of Havering atte Bower*, 5 B. & Ald. 691 (E. C. L. R. vol. 7). In *Dye v. Bennett*, 9 Com. B. 281 (E. C. L. R. vol. 67), (where the application was for a mandamus to examine witnesses at Sydney), Wilde, C. J., said: "Primâ facie, the party is entitled to have his witnesses examined, wherever they may happen to reside. It is for the party objecting, to show some ground of objection." Alleged misconduct of the party to be examined (at least if it be not a misconduct touching the cause itself) is no ground of objection: and the allegations here, founded on the supposed bankruptcy, assume the very point which is in litigation.

Lord CAMPBELL, C. J.—I do not lay down as a general rule that *495] there may not be a commission to *examine parties abroad on their own behalf. But it lies upon them to show that such a commission would be conducive to the due administration of justice: it is not enough to represent merely that they are living out of the jurisdiction of the Court. If an examination abroad were granted on such terms, the mischief evidently follows, that recourse would constantly be had to this practice by parties commencing suits and not wishing to be examined in Court. Nothing more would be necessary in such a case than to sail across the Channel. The words "it shall be lawful" are often obligatory: but Mr. *Willes* contends only that the commission should be grantable if a primâ facie right is shown: and he does not, I think, show even a primâ facie right. It appears to me in this case not conducive to the due administration of justice that the party should not come into the witness box and be subject to cross-examination.

WIGHTMAN and ERLE, Js., concurred.

CROMPTON, J.—The only doubt in my mind was, whether or not it was discretionary in the Court to grant a commission under the statute or refuse it. In the note (h) on stat. 1 W. 4, c. 22, in 1 Chitty's Statutes, 1121, 2d ed., it is said that the granting a commission is in the discretion of the Court; and *Duckett v. Williams*, 1 Cro. & J. 510,† S. C. 1 Tyr. 502, is cited. Bayley, B., says there: "The Act may not be obligatory, and the Court may exercise a discretion, to be regulated by the circumstances of each case, whether it will issue a commission." The words "it shall be lawful," in a statute, are obligatory or not,

(*) 1st Ed., where *Pipe v. Steele*, 2 Q. B. 733, is also referred to.

according to the subject-matter. The object of this statute was *to give, through the medium of a Court of law, that which [*496 otherwise could not have been obtained without recourse to equity: and it must be construed according to that intention.

Rule discharged.

DOE, on the demise of LUCY MARY KING, v. GRAFTON.

May 5.

Premises were let from 19th April, 1841, at the yearly rent of 42*l.*, payable quarterly, the first payment of 7*l.* 13*s.* 6*d.*, to be made on 24th June, 1841, being the proportion down to that date; the tenant to hold and enjoy, &c., at the said rent, until one of the said parties should give the other six calendar months' notice to quit; the tenant to leave the said premises in as good condition as at the date of the agreement.

Held, that notice might be given to quit at the expiration of any six months after June 24th: and that a notice on 24th June for 25th December, 1841, was good.

EJECTMENT for premises in Chancery Lane in the county of Middlesex. On the trial, before Lord Campbell, C. J., at the Westminster sittings after last Hilary Term, the following agreement was proved, under which the defendant had held the premises as tenant of the lessor of the plaintiff.

"Memorandum of agreement made and entered into the 19th day of April, 1841, between Lucy Mary King, of," &c., "widow, of the one part, and Henry Grafton, of," &c., "philosophical instrument maker, of the other part.

First, the said L. M. King agrees to let, and the said H. Grafton agrees to take, all that the ground floor and front room on the second floor of the dwelling-house of the said L. M. King, situate in Chancery Lane aforesaid, and numbered 80, at the yearly rent of 42*l.* payable quarterly; the first payment, of 7*l.* 13*s.* 6*d.*, to be made on the 24th day of June next, being the proportion of rent from the 19th of April, 1841, to that date. And it is hereby further agreed that the said H. Grafton shall and may hold and enjoy the said ground floor and room *at the said rent, free from all rates and taxes, until one of the [*497 said parties shall give unto the other six calendar months' notice in writing to quit at the expiration of any such notice the said Henry Grafton shall and will leave the said premises with the fixtures thereon in as good state and condition as the same now are. And it is also agreed," &c. (no alteration to be made in the premises without the consent of L. M. King, nor the shop used for any other business than that of a philosophical instrument maker; and Grafton to have the use of certain fixtures, which were scheduled, so long as he should occupy, &c.). "As witness the hands of the parties hereto, the day and year first above written.

LUCY KING."

The lessor of the plaintiff gave notice on the 24th June, 1851, to

quit on 25th December following. For the defendant it was urged that a notice ought to have been given expiring on the 19th of April, or, if not, then on the 24th of June. The Lord Chief Justice thought otherwise: and the jury, under his Lordship's direction, found a verdict for the plaintiff.

Warren, in this term (April 17th), moved for a new trial on the ground of misdirection. He cited several authorities (discussed afterwards on argument upon the motion); and (April 20th) a rule *Nisi* was granted.

G. Hayes now showed cause.—Where an agreement is made generally, to quit at half a year's or a quarter's notice, the half-year or quarter must end with an entire year of the tenancy; *Doe dem. Pitcher v. Donovan*, 1 Taunt. 555.(a) But here the parties have made a special agreement (not orally as in that case, but in writing) by which *498] the first payment of rent (for part of a quarter) was to be made on 24th June, and the defendant was to hold, at 42l. a year, payable quarterly, until one party should give the other six months' notice to quit; and the defendant undertook to quit at the expiration of "any such" notice. The starting point is 24th June; the rent for the broken period preceding was calculated, and was to be paid off on that day; and the defendant then commenced a holding which was determinable by six months' notice from any quarter day. The half-year's notice might have been given on the first Michaelmas day. If this was not so, a tenancy from year to year must have been contemplated; but the parties have not used any words expressing such an intention: and the special habendum clearly implies a different one. The case is not so strong in favour of a yearly taking as *Wilson v. Abbott*, 3 B. & C. 88 (E. C. L. R. vol. 10), where a half-yearly rent was paid, but the Court did not consider the tenancy as extending from year to year. In *Kemp v. Derrett*, 3 Camp. 510, the agreement was that the tenant should "always" "be subject to quit at three months' notice:" and Lord Ellenborough held this to be a tenancy from three months to three months, reckoned from the day of entry, determinable by notice ending with any such period of three months. There, "always" "subject to quit" could not have meant subject to quit only at one particular quarter day: a similar remark applies here to the words "at the expiration of any such notice." *Chambre, J.*, observed, in *Doe dem. Pitcher v. Donovan*, 1 Taunt. 557, that "if it was a tenancy from year to year, with a quarter's warning, it would be a quarter ending with the year: but if it were a demise for one year only, and *499] then to *continue tenant afterwards, and quit at a quarter's notice, it would be a quarter ending at any time." In *Brown v. Burtenshaw*, 7 Dowl. & R. 603 (E. C. L. R. vol. 16), cited on the

(a) S. C., at *Nisi Prius*, 2 Camp. 78.

motion for this rule, it was not decided whether the three months' notice, ending within the year, was good or not; Bayley, J., thought it doubtful in the particular case, though he admitted that such a notice might be good by usage: and the Court thought another trial desirable.

Warren, contra.—A yearly tenancy was constituted in this case, according to Doe dem. Pitcher v. Donovan, 1 Taunt. 555. The agreement is to take "at the yearly rent of 42l., payable quarterly." [Lord CAMPBELL, C. J.—That may be only the mode of computing the rent.] A general hiring of a servant at so much a year is a yearly hiring. "Payable quarterly" merely denotes the time of payment. Six calendar months' notice is the usual term in a yearly tenancy. The words "at the expiration of any such notice," properly read, begin a sentence, which has reference to the giving up of the premises and fixtures in good condition: it is immaterial to this head of the agreement what the time of notice was: the stipulation is, in substance, that, whichever party gives notice, the tenant shall be bound to deliver up everything in the condition bargained for. Some difficulty arises from the entry in the middle of a quarter; but, in any view of the case, notice for 25th December cannot be correct. In Doe dem. Cornwall v. Matthews, 11 Com. B. 675 (E. C. L. R. vol. 73), the tenant entered on May 7th, 1850, on an agreement, at a rent payable quarterly. No rent was ever paid. It was contended that the tenancy must run from June 24th, 1850; and *Doe dem. Holcomb v. Johnson, 6 Esp. N. P. C. 10, and [500 Doe dem. Savage v. Stapleton, 3 Car. & P. 275 (E. C. L. R. vol. 14), were cited: but the Court of Common Pleas held that the tenancy was properly determined by a notice ending May 7th, 1851. In Doe dem. Wadmore v. Selwyn, Adams on Ejectment, 107, 4th ed., where the tenant entered during a quarter, agreeing to pay rent "quarterly and for the half-quarter," it was left to the jury whether the tenant held from the quarter day before, or the quarter day after he entered; and the jury, under Lord Ellenborough's direction, found "that the tenancy commenced with the preceding quarter." [WIGHTMAN, J.—The notice here must stand on the express stipulation, if there be one, to quit at any six months; otherwise there is no view which can support it.] The language of Lord Kenyon in Shirley v. Newman, 1 Esp. N. P. C. 266, supports the principle relied on by the defendant, though an exception is there allowed in the case where a notice, other than the ordinary one, is acquiesced in. In Kemp v. Derrett, 3 Camp. 510, there was a peculiar expression, not used here, that the tenant should "always" be subject to quit at three months' notice. There is no indication on the face of this agreement that less than a year's holding was contemplated: it was not necessary to make an express provision for a six months' notice. The mention of six months' notice, and of the "expiration of any such notice," refers only to the

usual incident of a yearly holding, which both parties must be supposed to have known.

*501] Lord CAMPBELL, C. J.—This notice was sufficient. *Looking to the agreement, I think there is no doubt of the intention, and that neither party had a notion of creating a tenancy which might not be determined by a six months' notice, as here given. If there had been any case supporting a different construction, I should have felt bound by it: but there is none which seems at all to controvert the conclusion that a notice for the 25th of December was sufficient according to the intention of the parties. It is, no doubt, true that, on an ordinary yearly letting, the six months' notice must expire at the end of the year. But here no words appear which make such a construction necessary. The word "yearly" is only a word of calculation; the payment is to be at the rate of a yearly rent of 42*l*. The first payment is to be for the period from 19th April to 24th June, being the proportion of rent to that date: there is nothing in that: then comes the regular habendum: and then "until one of the said parties shall give unto the other six calendar months' notice in writing to quit." That indicates the term; which is not to be less than six months, and not necessarily longer. Therefore the onus which rested upon Mr. Warren in this case has not been sustained: the tenancy is not shown to have been yearly; and, if it was not, there was no need that the notice should expire at the period when the tenancy commenced. In *Doe dem. Pitcher v. Donovan*, 1 Taunt. 555, there was nothing to indicate that the notice was not meant to expire on the day when the tenancy began. Here, it is expressly agreed that the first payment shall be on the 24th of June for the rent due from April 19th; that the other payments shall be *502] quarterly; and that the tenant shall hold until one *party shall give the other six months' notice. And that notice was given on the 24th of June.

WIGHTMAN, J.—Every case of an express agreement, as this was, must be decided on its own terms. "At the yearly rent of 42*l*. payable quarterly," would indicate a yearly tenancy; but what follows is inconsistent with this: provision is made for paying the portion of a quarter, to 24th June; and it is then added: "until one of the said parties shall give unto the other six calendar months' notice." These are the effective words, and decide the construction of the agreement.

ERLE, J.—The authorities determine that, where premises are taken on a yearly tenancy, the term must expire with the year. But that is so only where the hiring is for a year; and in this case the presumption of a yearly taking which might result from the mention of a yearly rent is rebutted by the words which follow.

CROMPTON, J.—There is no doubt that a holding was commenced from the 24th of June, which would, *primâ facie*, be a yearly one: but it is cut down by the subsequent words allowing either party to determine

it by a notice at six months, which may not be the six months usually contemplated under a yearly holding.

Rule discharged.(a)

(a) See *Tress v. Savage*, 4 E. & B. 37 (E. C. L. R. vol. 82).

The QUEEN against FLETCHER. May 7.

Reported, 2 E. & B. 279 (E. C. L. R. vol. 75).

*JAMES HENRY LEWIS against NICHOLSON and PARKER. May 7. *503

Assumpsit on a promise that, if the assignees of a bankrupt would permit the sale of his goods, defendant would pay plaintiff the net proceeds to the amount of his debt secured on such goods. *Plea*: Non assumpsit. On the trial it was proved that defendants, being solicitors to the assignees, wrote to plaintiff's solicitor, saying "In consideration of" plaintiff's "consenting to the sale" "we hereby, on behalf of the assignees, consent that the net proceeds" shall be paid to plaintiff. This offer was accepted; the goods were sold; but the net proceeds were not paid over. The letter was written by the authority of the trade assignee, but not known to nor ratified by the official assignee. Other subsequent letters were in evidence. Nonsuit with leave to move.

Held: that subsequent letters were not admissible to aid in construing the contract in the first letter. That, on the true construction of the letter, defendants did not contract themselves, but made the contract for the assignees: that the trade assignee had no authority to bind the official assignee personally: but that this absence of authority did not make defendants liable on the contract as principals; and that the nonsuit was right.

Observe: that in such cases there is an implied undertaking by the professed agent that he has the authority he professes to have.

DECLARATION stated that Messrs. Arless & Tucker had assigned by bill of sale to plaintiff by way of security for 268*l.* 7*s.* certain goods; and that whilst the debt was unsatisfied Arless & Tucker became bankrupts. That the goods were seized by their assignees, who were about to sell them; and plaintiff gave notice that he claimed the goods and would forbid the sale. That, in consideration plaintiff would consent to the sale, defendants promised that the net proceeds of the effects included in the bill of sale should be paid to plaintiff to the extent of the balance then due to him. Averments of consent by plaintiff, and that the sale took place. Breach, that the net proceeds were not paid to plaintiff. There were also counts for money had and received, and on accounts stated.

Plea: Non assumpsit. Issue thereon.

On the trial before Lord Campbell, C. J., at Guildhall, at the sittings after last Hilary Term, the material facts appeared to be that the defendants were solicitors to the *assignees of Messrs. Arless & Tucker, who had become bankrupts. The trade assignee had ordered a [*504

sale by auction of goods seized as the property of the bankrupts, when the plaintiff's solicitor gave notice that the plaintiff claimed part of the goods under a bill of sale by way of mortgage. The following letters were then proved.

Defendants to plaintiff's solicitor, 26th August, 1851.

"Re Arliss and Tucker. Sir, In consideration of Mr. James Henry Lewis, for whom you act, consenting to the sale, by Messrs. Lewis & Son, of the bankrupts' printing materials and other effects (part whereof is included in a bill of sale to Mr. J. H. Lewis by way of mortgage, dated the 16th of March, 1850), we hereby, on behalf of the assignees, consent that the net proceeds of the effects included in the said bill of sale shall be paid over to you or your client to the extent of the balance now remaining due under the bill of sale for principal and interest. We shall feel obliged by your sending us immediately a consent to the sale accordingly. Yours faithfully, NICHOLSON & PARKER."

Plaintiff's solicitor to defendants, 27th August, 1851.

"Re Arliss and Tucker. Dear Sirs, In compliance with the undertaking given by you herein, and contained in your letter of the 26th instant, I hereby, on the part of Mr. James Henry Lewis, consent to the sale by Messrs. Lewis & Son of the bankrupts' printing materials and other effects (part of which is included in the bill of sale to Mr. J. H. Lewis by way of mortgage, dated the 16th of March, 1850). I am, Gentlemen, Your obedient servant, J. H. F. LEWIS, Solicitor to the said J. H. Lewis."

The sale took place accordingly. The trade assignee of the bankrupts had authorized the writing of the letter *of 26th August, *505] 1851. The official assignee was absent at the time, and did not know of the writing of that letter till afterwards; he was called as a witness for the plaintiff, and proved that he never ratified the contract in that letter.

Some letters written after the dispute had arisen were put in evidence, which, as plaintiff contended, showed that defendants considered themselves as personally bound by the undertaking of 26th August.

The Lord Chief Justice directed a nonsuit, with leave to move to enter a verdict if the Court should be of opinion that, on the documents and evidence, the plaintiff was entitled to recover.

Shee, Serjt., in the ensuing term, obtained a rule *Nisi* accordingly.

Bramwell and *Willes* now showed cause.—The plaintiff claims to be entitled to a verdict on two grounds: 1, that the written contract was in such terms as to amount to a personal undertaking by the defendants: 2, supposing the written contract to be made with the assignees, through the agency of the defendants, that there was no authority in fact, and therefore in law the defendants are liable as principals. The defendants deny all these propositions. In construing the letter of 26th August, it is material to observe that the promise is to do a thing which

the writers' clients, the assignees, could perform, but which, without their consent, the writers could not; that it is in consideration of the client of the person to whom it is addressed consenting to a matter beneficial to the assignees and in which the writers had no interest; and that, though the promise is in some degree worded in *the first [*506 person, it is qualified by saying the promise is by *us*, but "on behalf of the assignees." In the answer, the plaintiff's solicitor, who was clearly not making a personal contract, uses the same form of speech. "In compliance with the undertaking given by you herein, and contained in your letter of the 26th instant, I hereby, on the part of Mr. James Henry Lewis, consent." These two letters form the contract; the whole question of construction is whether at the time when these words were written, applying them to the facts, the intention appears to have been to make a contract between the solicitors or between the clients. It cannot be expected that any case should be found in which the contract has been in words closely resembling the present; but the reasoning of the judgment of the Court of Exchequer Chamber in *Downman v. Williams*, 7 Q. B. 103 (E. C. L. R. vol. 53),^(a) seems very applicable, and shows that this is not a personal contract. *Burrell v. Jones*, 3 B. & Ald. 47 (E. C. L. R. vol. 5), will be cited on the other side: but there the words were "We, as solicitors," &c., "do hereby undertake to pay." These words import a personal undertaking; and there was nothing in the fact that they were solicitors to show that there was no intention to undertake so. In *Appleton v. Binks*, 5 East, 148, and in *Hall v. Ashurst*, 1 C. & M. 714,† S. C., 3 Tyr. 420, contracts, expressed to be on behalf of others, were construed to be personal; but that was because on the face of the instrument it appeared that they could not operate otherwise: in *Appleton v. Binks* because the instrument was under seal, and not sealed by the principal; and in *Hall v. Ashurst* because the "London creditors," on *whose [*507 behalf the defendant made the contract, were not a body with whom it could be intended to make a contract. That is the ground of Lord Lyndhurst's judgment.

Then as to the second point. The trade assignee authorized this contract; he as trade assignee had general authority over the estate of the bankrupts; and the official assignee, having left him alone in the management, must be taken impliedly to have given him authority to act for him. [Lord CAMPBELL, C. J.—Probably he gave him that authority as to selling the estate: but you must go so far as to show that the trade assignee had authority to bind the official assignee personally by a collateral contract.] Supposing that in fact he was not bound, that does not make the defendants liable as principals. If they had acted *malâ fide*, there can be no doubt that they would be liable in

(a) Reversing, in part, the judgment of Q. B. in *Jones v. Downman*, 4 Q. B. 235 (E. C. L. R. vol. 45), note (a).

tort for deceit. Perhaps they are liable on an implied assumpsit that they had authority to bind the assignees; but they are not principals; *Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66). The declaration in this case is that *defendants promised* to pay. The proof is that defendants asserted or, at most, promised that *the assignees promised* to pay. The measure of the damage for not paying a sum of money, if there was a contract to pay it, is the sum of money. The measure of the damage for not having authority to contract for a principal is the value of the recourse to that principal, and may be nominal.

Shee, Serjt., and *Macnamara*, in support of the rule.—The defendants contracted as principals. The letters of *26th and 27th August are ambiguous, and may be explained by the subsequent acts and letters of the parties; *Harper v. Williams*, 4 Q. B. 219 (E. C. L. R. vol. 45), *Downman v. Williams*, 7 Q. B. 103 (E. C. L. R. vol. 53). [ERLE, J.—In *Downman v. Williams* the Court looked at all the letters forming the contract in order to see what the contract was, and to the subsequent letters and acts to see whether there was authority to make it. But I do not think that in either that case or *Harper v. Williams* they used subsequent admissions, whether in writing or not, to construe a written contract.] Taking the letters by themselves, they import a personal contract. In several cases besides *Hall v. Ashurst*, 1 C. & M. 714,† S. C. 3 Tyr. 420, parties have been held personally liable on contracts expressed to be made “on behalf” of others. [CROMPTON, J., referred to *Watson v. Murrell*, 1 Car. & P. 307 (E. C. L. R. vol. 12).] There are also similar decisions in *Ex parte Bentley*, 2 Deac. & Ch. 578, *Kennedy v. Gouveia*, 3 Dowl. & Ry. 503 (E. C. L. R. vol. 16), *Norton v. Herron*, Ry. & M. 229 (E. C. L. R. vol. 21).

But, supposing that the contract purports to be only made by defendants as agents, there was no real principal; for the trade assignee has not authority to throw a personal responsibility on the official assignee; *Ex parte Evans*, 3 Deac. & Ch. 470, *Ex parte Young*, 2 Deac. 240, *Munk v. Clarke*, 10 Bing. 102 (E. C. L. R. vol. 25). Then, not having a principal, the defendants are liable personally on the contract; *Jones v. Downman*, 4 Q. B. 235, note (a) (E. C. L. R. vol. 45), note to *Thomson v. Davenport*, 9 B. & C. 78 (E. C. L. R. vol. 17), in *Smith's* *509] *Leading Cases*, (a) *Kennedy v. Gouveia*. (b) The recent case of **Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66), may be supported on the ground that the contract was made as by the owner of a particular ship, which the defendant there was not.

LORD CAMPBELL, C. J.—I am of opinion that the rule must be discharged. Looking at the two letters which constitute the contract, I think it appears on the face of them, that the defendants did not intend

(a) 2 *Smith's Leading Cases*, 222, 228 a (3d ed., by Keating & Willies).

(b) Note (a) to *Thomas v. Hewes*, 2 C. & M. 530.† See S. C., 4 Tyr. 335, 338.

to make themselves personally liable on the contract, but to make a contract between the plaintiff and the assignees. It is quite clear that the plaintiff's solicitor, to whom the letter of 26th August was addressed, was not himself a contracting party, but was acting as agent, making a contract for the plaintiff: and I think that the true construction of the letters is that the defendants also were not contracting parties, but acting as agents for the assignees, making a contract for them, and, as I think, personally contracting that they had authority to make a contract binding the assignees. The letter expresses that, in consideration of the plaintiff consenting to the sale, "we hereby, *on behalf of the assignees*, consent." My brother *Shee* in effect asks us to read the contract as if the words *on behalf of the assignees* were not there; but they are there; and the nature of facts shows that they were meant to express a contract by the assignees; for it was the consent of the assignees to pay over the money that was material to the plaintiff. The answer refers to "the undertaking given by you herein, and contained in your letter." That however does not show that it was understood by the writer to be a personal undertaking by the defendants, but merely refers to the undertaking as made in their letter, and by them. I think therefore that, looking at these two letters which form the contract, it appears to have been the intention of both parties that the consent should be that of the assignees, not that of the defendants. That being so, I am clearly of opinion that we cannot look to subsequent letters to aid us in construing the contract. It is always legitimate to look at all the coexisting circumstances, in order to apply the language, and so to construe the contract; but subsequent declarations showing what the party supposed to be the effect of the contract are not admissible to construe it. [*510]

No authority on the construction of a contract can be precisely in point, unless the words of the contracts are the same: but it seems to me that the present contract resembles that in *Downman v. Williams*, 7 Q. B. 103 (E. C. L. R. vol. 58), which was held to be not a personal undertaking, but a declaration of agency on behalf of the principals. In *Burrell v. Jones*, 3 B. & Ald. 47 (E. C. L. R. vol. 5), there were no words to show that the undertaking was on the behalf of any one. In *Hall v. Ashurst*, 1 C. & M. 714,† the undertaking was on behalf of the London creditors. And in *Watson v. Murrel*, 1 Car. & P. 307 (E. C. L. R. vol. 12), the undertaking was on behalf of the parish. It could not reasonably be intended that the plaintiff should contract with such bodies; and therefore it was apparent on the face of the instrument that the contract must be intended to be personal; but in the present case there is nothing unreasonable in intending that the contract should be with the assignees.

Then the other point is to be considered. I think the facts raise it, as the trade assignee had no authority to make the official assignee per-

*511] sonally liable on such a *collateral contract. He might give assent, binding on both, to the disposal of the goods or money; but this goes much beyond such authority. So, the principals not being bound, the question arises whether the defendants are liable in this form of action. In the note to *Thomas v. Hewes*, 2 C. & M. 519, 530,† note (e), S. C. 4 Tyr. 335, 338, it is stated to have been said by Bayley, B., that, "where an agent makes a contract in the name of his principal, and it turns out that the principal is not liable from the want of authority in the agent to make such contract, the agent is personally liable on the contract." That is a high authority; but I must dissent from it. It is clear that it cannot apply where the contract is peculiarly personal; otherwise this absurdity would follow, that, if A., professing to have but not having authority from B., made a contract that B. should marry C., C. might sue A. for breach of promise of marriage, even though they were of the same sex. Perhaps this distinction would be enough to support the decision in *Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66), as there the contract might be said to be peculiarly made with the owner of the ship, which the defendant was not; but I go further. I think in no case where it appears that a man did not intend to bind himself, but only to make a contract for a principal, can he be sued as principal, merely because there was no authority. He is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not. In either way he may be made liable for the damages occasioned by the absence of authority.

*512] But I think that to say he is liable as principal is to make *a contract, not to construe it. I think therefore that these defendants were liable, but not in this action; and that the nonsuit, therefore, was right.

WIGHTMAN, J.—I also think that the nonsuit was right. The declaration is on a contract by the defendants personally. The proof is that a contract was made by them "on behalf of the assignees," language which, I think, *prima facie* imports that they made the contract only as agents. But it is said that this language is ambiguous, and may be controlled by surrounding circumstances, or explained by other documents, so as to show a personal liability. Now I think, that, if we look only at the legitimate evidence of the contract, there is no ambiguity at all. It all depends on the two letters; these formed the complete contract; and no subsequent statements written or verbal can have any effect on the construction of the contract already complete. Taking the words of these letters, it seems to me that it plainly was the intention that the defendants should not be personally liable, but the assignees. *Jones v. Downman*, 4 Q. B. 235, note (e) (E. C. L. R. vol. 45), is relied on. There the defendant, a solicitor, signed a letter in which he used the language, "I undertake (on behalf of Messrs.

Esdaile and Co.) to pay" your bill of charges. The Court below arrived at the conclusion that the defendant had no authority from his clients Esdaile and Co. to make such a contract to bind them, and that, as was said in the judgment, "the language of the instrument is such that, if the defendant really had no authority, he must be taken to have contracted in his own name and character." That decision was reviewed in error, and was reversed,^(a) on the *ground that the contract in its legal construction was "a contract entered into [*513 by an agent on behalf of his principal," and that the want of authority to make such a contract did not appear; so that the Court of error pronounced no opinion on the effect of the absence of authority. In the present case there was not authority to bind the assignees; that may be assumed. Then can the defendants, having made a contract expressed to be by them as agents only, be liable on it as principals? That raises the question discussed in *Jones v. Downman*. There, in the judgment, the Court quote the following passage from Story's Commentaries on the Law of Agency, p. 335 (4th ed. Boston 1851), c. x., s. 264. "Wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person, with whom he is dealing for or on account of his principal." That may very well be admitted to be literally true, without its being an authority that he is liable as principal to fulfil the contract. I am strongly inclined to think that there is in such cases an implied undertaking by the agent that he has the authority to bind his principal which he assumes to have. Certainly, if there is fraud, he would be answerable personally in an action on the case; if there is such an implied undertaking, he is liable personally in an action of assumpsit whether there be fraud or not. In the note to *Thomas v. Hewes*, 2 C. & M. 530, note (e),† S. C. 4 Tyr. 335, 338, cited at the bar, Bayley, B., is said to have laid down the general rule, that, where an agent makes a *contract in the name of his principal, and it turns out that the principal is not liable from the [*514 want of authority in the agent to make such contract, the agent is personally liable on the contract. If Bayley, B., really meant, as he is understood to have done, that the man, through contracting as agent, was liable personally as principal, I must dissent from his doctrine. There is no case in banc in our Courts in which such has been the decision. In 2 Smith's Leading Cases (3d ed.), 223 a, in the note to *Thomson v. Davenport*, 9 B. & C. 78 (E. C. L. R. vol. 17), it is stated that on this subject the decisions of the Courts of New York conflict with those of the Courts of Massachusetts and Pennsylvania. I agree with what is stated to be the doctrine of the latter courts. For these reasons I think the rule should be discharged.

(a) *Downman v. Williams*, 7 Q. B. 163 (E. C. L. R. vol. 55).

ERLE, J.—The first question is, what is the true construction of this contract. Looking at the terms of the instruments, and the circumstances under which they were written, I think the construction is that the defendants made a contract between the plaintiff and the assignees, and signed it as agents of the assignees. And I think that subsequent admissions, whether in writing or not, are not to be taken into account by us in construing the written instrument in which the contract was contained.

I also think that the defendants had not the authority of both assignees to make the contract. The question therefore arises, Are they liable as principals on the contract, though intending and expressing an intention to act only as agents in making it? I think they are not. *515] I think that, in general, no contract is made by *the law contrary to the intention of the parties. The definition of a contract is that it is the mutual intention of the two parties. There is a class of what are called implied contracts, such as the promise to pay money had and received to the plaintiff's use: but, when it is said that such a contract is implied contrary to the intent of the person receiving the money, it is in truth only a technical mode of naming the remedy which the law gives against that wrongdoer. I know of no case in which what is properly called a contract is made by the law contrary to the intent of the parties.

CROMPTON, J.—I agree that the defendants had not authority to make the contract for both assignees. Taking the contract to be only a promise by the defendants as agents, it is necessary to decide what has long been a moot point at law, whether, if a person make a contract as agent only, but has really no authority to bind the supposed principal, he is personally liable as principal. Perhaps it was not necessary to determine that point in *Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66), though I think it was there decided, and in my opinion well decided, that the personal liability does not arise. Before the decision of that case, the contrary had been laid down at *Nisi Prius*, but never in banc. Now, after that case, and the present decision, it must be considered as the decided law, that the remedy against the person who professes to make such a contract, but has not authority, is either by an action for the deceit, alleging and proving the scienter, or probably on an implied contract that he had authority; but not by treating him as principal.

*516] *On the construction of the contract in this case I have had rather more doubt, as there are several cases in which solicitors have been held personally liable on undertakings for their clients. But on the whole I think the undertaking in this case more nearly resembles that in *Downman v. Williams*, 7 Q. B. 103 (E. C. L. R. vol. 53), (a) than

(a) See *Tanner v. Christian*, 4 E. & B. 591 (E. C. L. R. vol. 39); *Lennard v. Robinson*, 5 E. & B. 125 (E. C. L. R. vol. 35.)

that in any other decided case. I therefore agree that the nonsuit was right.

Rule discharged.(b)

(a) Reported by C. Blackburn, Esq.

FARROW and Another, Assignees, &c. v. MAYES. May 7.

A. having commenced an action of debt in the Queen's Bench against B., a trader, B. proposed that a Judge's order should be made for stay of proceedings upon payment of debt and costs, and sent to A. a summons for that purpose, upon which a consent was endorsed by A. A Judge's order was thereupon made, at the instance of B., directing proceedings to be stayed on payment of debt and costs; in default of payment judgment to be signed and execution to issue. B. served a copy of this order on A. Neither the original order, nor any copy of it, was filed with the clerk of the dockets and judgments in the Queen's Bench, as directed by stat. 12 & 13 Vict. c. 106, s. 137. Judgment was signed and execution taken out, under the order: and the sheriff paid to A., from proceeds of the sale of certain goods of B., the debt and costs for which execution had issued. After the execution and payment, B. became bankrupt.

Held that, under stat. 12 & 13 Vict. c. 106, s. 137, the order, judgment, and execution were void as against B.'s assignees, the order not having been filed; and that the assignees might recover from A. the amount paid him under the execution, as money had and received to their use as assignees.

DECLARATION, by plaintiffs as assignees of Edward Steward, a bankrupt, contained three sets of counts. The first set was for money had and received by the defendant to the use of the said E. Steward before he became a bankrupt, and on an account stated between the defendant and the said E. S., before he became a bankrupt; alleging a promise by *defendant to the said E. S. before the bankruptcy. The [517 second set of counts was similar to the first, but alleged a promise by defendant, after the bankruptcy, to the plaintiffs as assignees. The third set was for money had and received to the use of the plaintiffs as assignees, and on an account stated between defendant and the plaintiffs as assignees, with a promise by defendant to the plaintiffs as assignees. Plea, Non assumpsit. Issue thereon. A case was stated for the opinion of this Court, by the order of Coleridge, J. It was substantially as follows.

The plaintiffs are the assignees of Edward Steward, a bankrupt, lately a farmer and corn merchant in Norfolk, who, on 2d February, 1850, was adjudged bankrupt, on the petition of the present plaintiff, Thomas Farrow. The petitioning creditor's debt, the trading, and an act of bankruptcy committed on 25th January, 1850, were duly proved. On 21st February, 1850, the present plaintiffs were duly appointed assignees.

The present action was brought by the assignees to recover back a sum of 96*l.* 6*d.* received by the now defendant under an execution against the bankrupt's goods, upon a judgment recovered in an action brought by the now defendant against the bankrupt, and signed and entered up by virtue of a Judge's order made in the said action, but which order had not, neither had any copy of it, been, nor has the said

order, or any copy of it, ever been, filed with the officer acting as clerk of the dockets and judgments in this Court. The circumstances under which the said order was made were as follows. The bankrupt, Steward, being indebted to the now defendant, John Mayes, in the sum of *518] 75*l.*, the said J. Mayes, on 2d October, 1849, *brought an action of debt for recovery of the said sum in this court, against Steward, and, on 8th November, 1849, delivered a declaration, to which Steward pleaded. On 19th November issue was joined, and notice of trial given. On 26th November, 1849, Steward's attorney called on the attorney for Mayes, and proposed giving a Judge's order for stay of proceedings on payment of the debt and costs on the 1st January then next, which was refused. On 28th November, 1849, Steward's attorney again called on Mayes's attorney, and offered a Judge's order for stay of proceedings, on payment of debt and costs on 12th December then next, to which Mayes's attorney agreed, and instructed his London agent accordingly. On 7th December the town agent of Mayes received from the town agent of Steward's attorney a summons to stay in conformity with the above arrangement, and endorsed a consent to stay, on payment, on or before 12th December, 1849, of 75*l.* and costs as between attorney and client. The town agent of Steward's attorney objected to the payment of costs as between attorney and client, and refused to draw up the order; and Mayes's attorney, on 11th December, 1849, took out a summons to show cause why the cause should not be set down for the adjournment day, and the record resealed, and why Steward should not pay the costs of the application. This summons was served, and attended before Patteson, J., who endorsed thereon the following memorandum. "Order: unless an order staying on payment of debt and costs on the 16th be served to-day: costs of the application to be costs in the cause. J. P. Dec. 12th." Steward's attorney elected to draw up the order to stay, and did draw it up *519] accordingly, upon the *consent originally given by the plaintiff's agent, except that the time of payment was, by the plaintiff's agent, altered in the said consent from the 12th to the 16th December. The following is a copy of it.

"Mayes v. Steward. Upon hearing the attorneys or agents on both sides, and by consent, I do order that, upon payment of 75*l.*, the debt due from the defendant to the plaintiff, for which this action is brought, together with costs, to be taxed and paid on or before the 16th of December next, all further proceedings in this cause be stayed. And I further order that, in case default be made in payment as aforesaid, the plaintiff be at liberty to sign final judgment and issue execution for the amount, with costs of judgment and execution, sheriff's poundage, officer's fees, and all other incidental expenses, whether by *feri facias* or *capias ad satisfaciendum*. Dated the 12th day of December, 1849.

J. PATTESON."

The summons to stay, with the consent originally endorsed thereon, were filed with the Judge's clerk, on the order being drawn up, in the usual manner; but Steward's agent served a copy of the order of 12th December on Mayes's agent on the same day when it was drawn up, and retained the possession of the original until 18th December following, when he lent it to Mayes's attorney for the purpose of taxing the costs and obtaining the Master's allocatur and signing judgment thereon if necessary.

Neither the said order of 12th December, 1849, nor any copy of it, has ever been filed with the clerk of the dockets and judgments in the Queen's Bench, under sect. 137 of "The Bankrupt Law Consolidation Act, 1849." Default having been made in payment of the said debt and costs, judgment was, on 18th *December, 1849, signed and entered up for 75*l.* debt and 19*l.* 9*s.* costs. Upon that judgment [520 so signed and entered up, a writ of testatum *fi. fa.* was, on 19th December, 1849, issued and lodged with the sheriff of Norfolk.

The sheriff, on 20th December, 1849, caused certain goods of the bankrupt to be taken in execution. On 22d December, 1849, a brother of the bankrupt paid the amount of execution and expenses thereon; and the sheriff's officer gave up the goods to him, with a receipt for the sum paid. No sale by auction of the goods took place; nor was any bill of sale executed by the sheriff. The sheriff, by his said officer on 27th December, 1849, paid to the now defendant, Mayes, out of the money so received, the sum of 96*l.* 6*d.* (the amount endorsed on the said writ of testatum *fi. fa.*) The present plaintiffs, as assignees of the bankrupt, requested the now defendant to pay over to them the said sum of 96*l.* 6*d.*; but he declined: and the plaintiffs obtained leave, under sect. 153 of the Bankrupt Law Consolidation Act, 1849, to commence this action; and it was accordingly commenced on 23d May, 1851.

The question for the opinion of the Court was, Whether or not, under the circumstances before mentioned, the plaintiffs, as assignees as aforesaid, are entitled to recover from the now defendant the said sum of 96*l.* 6*d.* so received by him under the said execution as aforesaid, or any part thereof. The case was argued in this term.(a)

Maniety, for the plaintiffs.—Stat. 12 & 13 Vict. c. 106, s. 137, enacts "that every Judge's order made by consent, *given" "by any [521 such trader defendant in any personal action, and whereby the plaintiff in such action shall be authorized forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action," "shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the dockets and judgments in the" "Court of Queen'

(a) April 27th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js., CC,

Bench within twenty-one days after the making of such order ;" "otherwise such Judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever." It is clear, therefore, that the payment to the defendant on behalf of the bankrupt in the present case, under the execution, is void, the order upon which that execution was issued not having been properly filed ; and the plaintiffs, as assignees, are entitled to recover the money so paid. The defendant will probably contend that this order was not "made by consent given" by the defendant in the action, inasmuch as it was at the instance of the defendant himself that the order was made, the consent being given on behalf of the plaintiff. But it is clear that the language of sect. 137 is intended to apply to all Judge's orders made in actions brought against a trader, by consent of either party. In *Bryan v. Child*, 5 Exch. 368,† though the decision there was on a different point, the meaning of sect. 137 was carefully discussed, and the opinion of the Court was clearly in favour of this construction of the section: had *522] the more limited view been adopted, the Court *would have intimated as much. It may be fairly contended that, even where the order is made upon the application of the defendant, it is made by his consent ; it certainly cannot be made without it.

O'Malley, *contrà*.—The plaintiffs are attempting to apply the provisions of sect. 137 to a case which was never contemplated by the Legislature in framing it. The mischief which the statute was intended to remedy was the practice of evading the practical operation of stat. 3 Geo. 4, c. 39,(a) which compelled the filing of all cognovits and warrants of attorney to confess judgment, by getting the consent of the trader to a Judge's order of this description, which placed the property of the trader as much in the hands of the particular creditor as a cognovit or a warrant of attorney. But no mischief is caused by a defendant, at his own request, obtaining an order to stay proceedings in a hostile action upon payment of debt and costs ; there no fraud is contemplated or practised upon the other creditors. Such a course stands upon the same footing as a judgment by confession or agreement under the County Court Acts.(b) Moreover, the order here is not an order made by consent of the defendant in the action, to which alone sect. 137 applies. The order, upon the face of it, shows that the words "by consent" there mean, by consent of the party upon whom the summons was served, namely, the plaintiff in the action. [Lord CAMPBELL, C J.—The order in question, whether it be made by consent of the defendant or of the plaintiff in the action, gives the *particular creditor a power of immediate execution over the property of the debtor, which the other creditors have not. Is not that one of the class

(a) Enlarged by stat. 6 & 7 Vict. c. 66.

(b) See stat. 13 & 14 Vict. c. 61, ss. 8, 9.

of orders over which the Legislature meant to exercise a control by compelling them to be registered, under sect. 137?] The statute was not intended to apply to orders made by consent in a hostile action, but only to those which were made collusively by the creditor and the debtor, for the express purpose of giving one creditor a preference over others. And the words "by consent given" "by any such trader defendant," in sect. 137, are too express to allow of that section being construed as applying also to orders made without such consent. It has been argued that, in one sense, every order made upon the application of a defendant is made by his consent. But that is not the ordinary meaning of the words. The order, at all events, cannot be said to be made by the defendant's consent until it is actually served by him. Now here a copy only of the order was served on the plaintiff in the action; it was therefore impossible for him to file the order; for, in the Queen's Bench, by sect. 137, the order itself, and not a copy, must be filed; nor could he make any affidavit of the time of the defendant's consent.

Moreover, sect. 137 was not intended to apply to cases where the order is perfected, by judgment being entered up and the debt being satisfied under such judgment, before any act of bankruptcy on the part of the debtor. The principle of the decision in *Wymer v. Kemble*, 6 B. & C. 479 (E. C. L. R. vol. 13), applies here. It is true that in *Biffin v. Yorke*, 5 M. & G. 428 (E. C. L. R. vol. 44), it was held that, under stat. 1 & 2 Vict. c. 110, s. 60, *a cognovit not filed, and [*524 upon which judgment had not been signed within twenty-one days, was void notwithstanding that the proceeds of the execution under judgment had been paid to the judgment-creditor before the insolvency of the debtor. But the words of stat. 3 Geo. 4, c. 39, s. 2, which stat. 1 & 2 Vict. c. 110, extends to insolvents, are much stronger than the language of sect. 137 of stat. 12 & 13 Vict. c. 106. The assignees are entitled, under the first-mentioned section, to recover "*all and every* the moneys levied or effects seized under and by virtue of such judgment and execution." Sect. 137 no doubt declares that execution under a Judge's order not duly filed shall be null and void "to all intents and purposes whatever;" but, construing that section in connexion with sect. 133, which provides that all executions *bonâ fide* executed and levied against the goods of a bankrupt before the date of the fiat shall be valid, provided the party issuing execution had not, at that time, notice of any prior act of bankruptcy, it is clear that the statute is not intended to avoid judgments which have been perfected by execution before the bankruptcy, and which have not been obtained by way of fraudulent preference. The assignees here claim the money as had and received by the defendant to the use of the bankrupt, and also to the use of the defendants as assignees. But, at the time when the money was paid over to the defendant, no bankruptcy had taken place,

and the plaintiffs were not yet assignees : their claim, therefore, cannot be supported in its present shape.

Manisty, in reply.—As soon as a copy of the order was served upon the plaintiff by the defendant, the *original order became an
*525] order made by consent of the defendant. The distinction urged on the other side is merely verbal. The argument that the judgment in the present case was perfected by execution before the bankruptcy begs the question whether, under the statute, there was any valid judgment or execution at all. [Lord CAMPBELL, C. J.—These orders are very common ; and it is therefore desirable that there should be an uniform judgment upon this point. We will consult our brethren.]

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

We are of opinion that the judgment and execution thereof in the action of *Mayes v. Steward* is rendered null by stat. 13 & 14 Vict. c. 106, s. 137, because the Judge's order upon which it was signed was obtained by consent of the defendant, then being a trader, and was not filed within twenty-one days after such consent given.

We think the Judge's order for judgment was obtained by the consent of the defendant, although it was made upon a bonâ fide application by the defendant to stay proceedings upon terms in a hostile action, and although the defendant had at first wished not to draw up the order, and only elected to do so because the plaintiff had an order enabling him to go to trial if it was not done. No defence arises from the time of this execution : the course of legislation upon this subject makes it clear to us that the enactment was intended to render void all such
*526] judgments, though signed within *twenty-one days after the consent given, and all such executions, though executed before the date of the fiat without notice of an act of bankruptcy. We think it follows that the money received under the execution became, by the bankruptcy, the money of the assignees, and so recoverable under this declaration.

The inconvenience arising from annulling a judgment by a bankruptcy makes the filing of Judges' orders for judgment a matter requiring careful attention.

Judgment for plaintiffs.

The QUEEN v. FRANCIS. *May 8.*

Under stat. 5 & 6 W. 4, c. 76, s. 23, which provides that no person shall be qualified to be elected councillor of a borough "during such time as" he has any share or interest in any contract with, or employment by or on behalf of, the council, a person who has entered into a contract with the council, and been employed by them in respect of such contract, is disqualified from holding the office, though such contract required the corporation seal, and is not sealed.

While such contract continues, the disqualification caused by it arises *de die in diem*; and, during that time a relator is not precluded, under stat. 7 W. 4 & 1 Vict. c. 78, s. 23, from applying for a *quo warranto*, though twelve calendar months have elapsed from the election of the party disqualified, or from the commencement of his disqualification.

MONTAGUE SMITH, in last Hilary Term, obtained a rule calling upon George Grant Francis to show cause why an information in the nature of a *quo warranto* should not be exhibited against him, to show by what authority he claimed to hold the office of councillor of the borough of Swansea, in the county of Glamorgan.

From the affidavits it appeared that Mr. Francis was first elected a councillor of the borough on 1st November, 1846, and was re-elected, at the expiration of his term of office, on 1st November, 1849. In 1848 he had undertaken, at the request of the mayor and town clerk, to *collect, arrange, and bind the books and documents of the corporation, and to purchase and arrange additional papers relating [*527 to that body. No sum was fixed for his remuneration; but in 1849, while still engaged in the undertaking, he agreed to complete it for 150*l.*, as the amount of his actual disbursements and expenses. This offer was accepted by the town council; and a minute was made of a resolution by them to that effect: but the corporation seal was not affixed to the resolution or any minute thereof; nor was any contract under the corporation seal ever entered into between the corporation and Mr. Francis. In July, 1849, Mr. Francis received 50*l.* on account; but he had received no further sum; nor had he proceeded with his undertaking since his election in November, 1849. Mr. Smith, the party at whose instance the motion was made, was elected a councillor, for the first time, in November, 1849.

Phipson now showed cause.—It will be contended that Mr. Francis is disqualified from holding office by reason of his contract with the town council, under stat. 5 & 6 Vict. c. 76, s. 28.(a) But, first, no valid contract has been entered into between himself and the town council. The contract should have been under the corporation seal; *Arnold v. The Mayor of Poole*, 4 M. & G. 860 (E. C. L. R. vol. 43). [Lord CAMPBELL, C. J.—The contract may not be valid *so as [*528 bind the Corporation; but it does not follow that it is not such a contract as will disqualify the other party to it from holding an office

(a) Sect. 23 provides that no person shall "be qualified to be elected or to be a councillor" or an alderman of any borough within the provisions of the act "during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of" the council of the borough.

in the corporation, under the statute. CROMPTON, J.—Suppose the contract had become illegal from the corporation paying Mr. Francis a larger sum than that fixed upon by the resolution. Would not he be still disqualified from holding office by reason of the contract? If the contract had been under seal; not otherwise. Corporations may make some contracts by parol: they can dispense with a seal where the proceeding is part of their duty under their constitution, or where it is of a nature which would render the affixing of a seal inconvenient or impossible; *Diggle v. London and Blackwall Railway Company*, 5 Exch. 442, 450:† but the contract here does not fall within that class of exceptions.

Next, this application is too late. Stat. 7 W. 4 & 1 Vict. c. 78, s. 28, provides that all applications for a quo warranto for the purpose of questioning the right to a corporate office must be made “before the end of twelve calendar months after the election or the time when the person against whom such application shall be directed shall have become disqualified, and not at any subsequent time.” If Mr. Francis has become disqualified, he became so when he was first elected a councillor, which was more than twelve months ago. [Lord CAMPBELL, C. J.—The contract is a continuing one; unless Mr. Francis threw it up on his election in 1849, there would be a subsequent disqualification *529] *de die in diem*.] He had done nothing under the contract *since July, 1849, before his last election. The words “become disqualified” must mean “first become disqualified;” if not, the statute would in reality impose no limit at all. [CROMPTON, J.—By stat. 5 & 6 W. 4, c. 76, s. 28, the disqualification is to continue “*during* such time as” the party shall have any interest in the contract. The present case seems to fall within that provision.]

Further, Mr. Francis will be out of office before any judgment can be given upon the return to the quo warranto; and the Court will therefore, as in *Regina v. Hodson*, 4 Q. B. 648, note (b) (E. C. L. R. vol. 45), exercise its discretion in not acceding to this application, which might have been made earlier.

Montague Smith, *contrà*, was stopped by the Court.

Lord CAMPBELL, C. J.—This rule must be made absolute. It is quite clear to me that the contract in question is within the provisions of stat. 5 & 6 W. 4, c. 76, s. 28, so as to disqualify Mr. Francis from holding office. We cannot look to see whether it be a contract upon which he could sue the corporation; it is, at all events, one in respect of which he has been employed and paid by the corporation; and it would be monstrous to hold that the statute was avoided by the fact of the contract not being binding upon the corporation. As to the lateness of the application; if Mr. Smith had been a member of the council at the time when the contract was entered into, that might have been a ground for refusing a quo warranto; but he was not; and his

mere knowledge of the existence of the *contract at that time [530 is not a ground for holding that he cannot now appear as the relator. With respect to stat. 7 W. 4 & 1 Vict. c. 78, s. 28, I think that this is a continuing contract, so as to create a disqualification *de die in diem*. No application for a *quo warranto* could be made after the lapse of twelve calendar months after the contract had ceased : but, while it continues, the application may be made at any time after its commencement.

ERLE, J., and CROMPTON, J., concurred.(a)

Rule absolute.(b)

(a) Wightman, J., was absent,

(b) A disclaimer was entered on 18th June following.

END OF EASTER TERM.

No case requiring a report was decided in Easter vacation.

CASES
ARGUED AND DETERMINED
IN
THE QUEEN'S BENCH,
AND
EXCHEQUER CHAMBER,
IN
Trinity Term and Vacation,

XV. VICTORIA. 1852.

THE Judges who usually sat in Banc in this Term and vacation were:—

LORD CAMPBELL, C. J.
COLERIDGE, J.

ERLE, J.
CROMPTON, J.

The Company of Proprietors of the KENNET and AVON Canal
Navigation v. CHARLES HANNINGTON WITHERINGTON.

By a Navigation Act the undertakers were authorized to make and maintain such navigation, and from time to time to alter their dams and weirs for that purpose; and to enter and make works upon lands for the purpose of the undertaking, first making satisfaction to the owners as Commissioners under the Act should direct. By a subsequent clause, any persons injured by the works were to receive compensation, to be assessed by the Commissioners. The Commissioners were named in the Act, and power given them to appoint successors from time to time. The navigation was made; and, as part of it, a dam across a river was enlarged. Subsequently, all the Commissioners died, without having appointed successors. The Company afterwards raised the dam to the injury of a millowner below.

Held by Wightman, Erle, and Crompton, Js., that the power to alter the dam still existed, even though the millowner should no longer have any means of obtaining compensation, as to which they gave no opinion:

Lord Campbell, C. J., dissentiente, and holding that the compensation clause having become incapable of execution by extinction of the Commissioners, the powers which the Act had conferred upon the Company to cause injury to other persons could no longer be exercised.

TRESPASS for destroying piles and stakes being part of a dam of plaintiffs in the river Kennet.

*Plea 1. That the dam was enlarged so as to obstruct the passage of the water as it was used to flow down to a mill in the occupation of defendant; and that defendant and those who had occupied the mill had for twenty years enjoyed the water as of right; and defendant justified removing so much of the dam as was an obstruction. Pleas 2 and 3 stated similar justifications, claiming the right to the water, respectively, by forty years' user and by prescription in right of Richard Tull, who had demised to defendant. [*532]

Plea 4 alleged a similar justification, claiming the right to the water by occupation, subject to a right of the plaintiffs to obstruct the water partially by a dam, which they had altered so as to increase the obstruction.

Replication to all four pleas that, by 2 stat. 1 G. 1, c. 24,(a) certain persons were empowered to make and maintain a navigation and works, and Commissioners were nominated to assess compensations; and that, under stat. 53 G. 3, c. cxix., local and personal, public,(b) these powers became vested in the plaintiffs, who for the necessary regulation of the water for the purposes of the navigation, "and for the necessary, reasonable, and beneficial use of the said navigation" by "boats, barges, lighters, and other vessels," altered and enlarged the dam in question.

Rejoinder that, before the passing of the last-mentioned Act, and before the alteration of the dam, all *the Commissioners named in the Act of Geo. 1, or appointed under or in pursuance of it, [*533] were dead, and that no successors had been appointed.

Demurrer. Joinder.

The demurrer was argued in last Term (April 23d),(c) by *Phipson* for the plaintiffs, and *Whateley* for the defendant. The judgments delivered seriatim by the Court make it unnecessary to report the argument at length.

The material parts of 2 stat. 1 G. 1, c. 24, are as follows.

Sect. 1 authorizes certain persons named, their heirs and assigns or nominees, "to make the said river Kennet navigable, portable, and passable for boats, barges, lighters, and other vessels from the said wharf or common landing-place at Reading to Newbury aforesaid, and from time to time to continue, maintain, and use such navigation in such manner as they shall think fit, and for those purposes to clear, scour," &c., "the said river," &c., "and to make, build up, dig, or cut through the banks of the said river," &c., "and to make such new cuts, trenches, or passages for water in, upon, or through the lands or ground adjoining or near unto the said river," &c., "as they shall think fit and proper, for navigation and passage of boats and other vessels, or any ways necessary for the more convenient, easy, and better carrying on and effecting the said undertaking, being the soil or ground of the King's most excel-

(a) "To make the river Kennet navigable from Reading to Newbury in the county of Berks." Reference was also made to stat. 3 G. 2, c. 35, which (s. 12) enabled the Commissioners to convict trespassers and enforce payment of damages by them.

(b) "To enable the Kennet and Avon Canal Company to raise a further sum of money to purchase the shares of the river Kennet navigation, and to amend the several Acts" (referred to by this statute) "passed for making the said canal."

(c) Before Lord Campbell, C. J., Wightman, Erle, and Crompton, J.

lent Majesty, his heirs or successors, or of any other person or persons, bodies politic or corporate, their heirs, or successors, and to remove and take away all trees," &c., which may hinder navigation, and to build, erect, set up, and make, over or in the said river, &c., or upon the lands adjoining or near to the same, such and so many bridges, sluices, locks, weirs, &c., dams, cranes, wharfs, warehouses, and other works, as and where they the said undertakers, their heirs, assigns, and nominees, shall think fit or convenient, and from time to time to alter, repair, and amend the same, and to make any ways, passages, and other conveniences for the carrying and conveying of goods, to or from the said river, navigable passages, streams, trenches, or cuts, and for carrying materials for erecting or making the said works, and for altering, repairing, or amending the same, and to lay the said materials on the grounds near to the place or places where the said works are to be done, and to alter any bridge, or to turn or alter any highways, in or upon the said river, as may hinder the navigation or *passage thereon, as also make towing-paths, &c., "as the said undertakers, *534] their heirs or assigns, shall think convenient, and to do all matters and things which the said undertakers, their heirs, &c., "shall think necessary, for the making and maintaining the said river, streams, cuts, and passages navigable and passable as aforesaid, or for the improvement or preservation thereof; the said undertakers, their heirs and assigns, first giving satisfaction to the owners or proprietors of such lands, weirs, mills, tenements, or hereditaments respectively as shall be digged, cut, or removed, or otherwise made use of for the carrying on or effecting the said navigation, or for maintaining or managing the same, according to the true intent and meaning of this Act as the Commissioners hereafter named for that purpose shall direct and appoint, in case the said undertakers, their heirs, assigns, or nominees, shall not beforehand have agreed with the proprietors of such weirs, mills, lands, tenements, and hereditaments respectively concerning the same."

Sect. 2. "And for the better effecting the premises, and due rating the value of the things for which satisfaction shall be given, according to the intent of this Act, if the persons concerned as aforesaid shall not agree among themselves, be it enacted by the authority aforesaid, that the most noble Charles Seymour, Duke of Somerset" (and several other persons named) "shall be and are hereby constituted and appointed Commissioners for settling, determining, and adjusting, in manner hereafter mentioned, all matters about which any difference may arise between the said undertakers, their heirs," &c., "and the proprietors of the said lands," &c.; and the "Commissioners, or any seven or more of them, are hereby empowered and authorized, and shall have full power and authority, to mediate between the said undertakers, their heirs, assigns, and nominees, and the owners and occupiers of such lands, weirs," &c., "adjoining to or near the said river, streams, brooks, or watercourses, as shall be intended to be made use of for the carrying on or effecting the undertaking aforesaid, and to settle and determine what satisfaction every such person or persons, bodies politic or corporate shall have for such proportion of his, her, or their lands, tenements, or hereditaments as shall be cut, digged, removed, or made use of as aforesaid, and for the damages that shall be thereby sustained, and to adjust," &c., the proportion of such purchase-money or satisfaction to be given to every tenant or other person having a particular estate, &c.: "and if it shall happen that any person or persons, bodies politic or corporate, shall decline such mediation, or refuse to deal or agree with the said undertakers, their heirs," &c., or through any disability or impediment cannot, "the said Commissioners or any seven or more of them are hereby authorized and empowered from time to time to issue out their warrant or warrants under their hands and seals to the sheriff" of Berks, for the impannelling and returning a jury, who "shall inquire or assess such damages and recompense as they shall think fit to be awarded to the owners and *occupiers of any such lands, tenements, or *535] hereditaments, or any part thereof, as shall be used for or damaged by making the said river navigable, for their respective estates and interests therein, by reason of the cutting, digging, removing, or otherwise using any of his, her,

or their lands, tenements, or hereditaments for the purposes aforesaid, or for the loss or damage which they shall or may respectively sustain thereby; and the said Commissioners, or any seven or more of them, shall give judgment for such sums to be assessed by such juries," which judgment is to be recorded, and "that upon payment of any such sum or sums so agreed on or assessed to the parties concerned, or tender thereof made," &c., "and if upon such tender as aforesaid they refuse or shall not be willing to receive the same, then, upon payment of such sum into the hands of such person or persons, as the Commissioners, or any seven or more of them, shall appoint, for the use of the parties interested as aforesaid, it shall then, and not before, be lawful to and for the said undertakers, their heirs, assigns, or nominees, their agents, workmen, and servants, to remove, dig, cut, or use so much of the said lands, tenements, or hereditaments for which such satisfaction shall be assessed or decreed as aforesaid, and thereon to make, erect, or do any works, matters, and things for the effecting and carrying on the said navigation, and for the supporting and maintaining the same, as the said undertakers," &c., "shall think requisite, and to have, use, and enjoy the same to and for their own proper use and benefit; and this Act shall be sufficient to indemnify, as well the said Commissioners as the said undertakers, their heirs," &c., "and all persons employed or authorized by them, against the said owners and occupiers, their heirs, successors, executors, administrators, or assigns, to all intents and purposes whatsoever." Proviso: no Commissioner to sit or act in any case where he is interested, or if he do not pay to the land tax for 100*l.* per annum.

Sect. 3 enacts: "That for supplying the number of the said Commissioners (in case of death, or any of their refusal to act), the surviving or other Commissioners, or any seven or more of them, shall from time to time, by instrument in writing under their respective hands and seals, nominate and appoint some other person or persons within the said county, having an estate of land of the yearly value of 100*l.*, in the place of him or them so dying or refusing, which said new Commissioner or Commissioners so nominated and appointed shall from thenceforth have like power and authority in all things relating to the matters aforesaid as if he or they had been expressly named in this Act; and every such instrument and nomination of new Commissioners shall from time to time be recorded by the clerk of the peace for the said county."

Sect. 8. "That if the said undertakers, their heirs, assigns, or nominees, shall, in pursuance of the powers of this Act, by any means raise the water in the said river above its ancient or usual height, whereby the adjacent lands may be more liable to be overflowed or damaged than they have *formerly been, that they the said undertakers, their heirs and assigns, at their own proper costs and charges, [*536 shall cause the banks of the said river to be proportionately raised and heightened in all places where need shall require, so that the new banks shall be able and sufficient to contain the waters at such their raised height, and also shall from time to time maintain and repair the same banks as often as occasion requires; or if the said undertakers, their heirs or assigns, in pursuance of the powers aforesaid, shall make any new cuts or trenches, by reason whereof any person or persons shall not have convenient ingress or egress into or out of their respective grounds or other hereditaments," &c., that then the undertakers, their heirs, &c., at their own cost, shall erect and maintain such sufficient bridges over every such new cut "as by the said Commissioners, or any seven or more of them, shall be directed."

Sect. 18. "That if any person or persons, at any time after the said river is made navigable, shall happen to sustain any damage or injury in his, her, or their meadow grounds, lands, tenements, hereditaments, mills, weirs, water engines, or wharfs, by the said undertakers, their heirs, assigns, or nominees, raising the water to a prejudicial height, or turning the stream, or by not sufficiently making up or repairing the banks of the said river, or cleansing the same, or by their taking away, wasting, or diverting the water from the said meadows, mills, water engines, or wharfs, in such case it shall and may be lawful for the said Commissioners, or any seven or more of

them, and they are hereby required, by the inquisition of twelve men, to be impanelled and returned as aforesaid, from time to time to settle and assess such damage or injury, and for securing a recompense or satisfaction for the same to the proprietors of such meadow grounds, lands," &c., "(in case the said undertakers, their heirs, assigns, or nominees, shall not (being thereto required) satisfy and recompense such damage or injury as shall be settled and assessed as aforesaid, with full costs of suit), to constitute one or more person or persons to receive the tolls, rates, and duties arising by the navigation of the said river Kennet, who shall, out of the said tolls, rates, and duties, in the first place pay and satisfy all and every sum and sums of money so to be settled and assessed for damages and costs as aforesaid; and the moneys so to be received by such receiver or receivers shall and is hereby declared to be esteemed as so much money received to the use of such proprietors or persons suffering damage as aforesaid, till satisfaction made for such damages and costs so settled and assessed as aforesaid, in order and course successively as such determinations for the same shall be in priority of time, and shall be taken, had, and recovered from the receiver or receivers appointed to receive the said tolls, rates, and duties as aforesaid in such manner, and by and with the like powers, privileges, and authorities, as the same are hereinbefore appointed to be taken, had, and recovered by the said undertakers, their heirs, assigns, or nominees."

*587] *The points for argument submitted to the Court were:

For the plaintiffs. That, as assignees and possessors of the powers granted by the Act of Parliament in the replication first mentioned, they were entitled to make any reasonable alteration in the dam or barrier in the river Kennet, mentioned in the declaration, which was necessary for the regulation of the water in the river for the purposes of the navigation. And that the rejoinder, which admits the reasonableness and necessity of such alteration, is bad. And that the powers conferred by the above Act were absolute, and not dependent upon the existence of Commissioners under the Act: and, therefore, that the existence of such Commissioners was not a condition precedent to the exercise of such powers.

For the defendant. That, on the true construction of the Act of Parliament in the replication first mentioned, the powers in the assumed exercise whereof the plaintiffs committed the acts sought to be justified in the replication were coexistent with the Commissioners under the Act; and that when the body of Commissioners was extinct the powers could no longer be exercised. That the existence of the right and the means of obtaining compensation is a condition precedent to the exercise of the powers; and, the body of Commissioners having become extinct, the right and means of obtaining compensation no longer exist.

Besides the case referred to in the judgments of the Court, *Boulton v. Crowther*, 2 B. & C. 703 (E. C. L. R. vol. 9), *Glover v. North Staffordshire Railway Company*, 16 Q. B. 912 (E. C. L. R. vol. 71), *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472,† and *Cane v. Chapman*, 5 A. & E. 647 (E. C. L. R. vol. 31), were cited for the plaintiffs; *588] and *Stourbridge Canal Company v. Wheeley*, 2 B. & Ad. 792 (E. C. L. R. vol. 22), *Ballard v. Way*, 1 M. & W. 520, 529,† S. C. Tyr. & G. 851, 862, *Holland's case*, 4 Rep. 75 a, 76 a, b, and

Buckeridge v. Flight, 6 B. & C. 49 (E. C. L. R. vol. 13),^(a) for the defendant.

Cur. adv. vult.

In this Term (June 12th), there being a difference of opinion on the Bench, the learned Judges delivered separate judgments.

CROMPTON, J.—This was an action of trespass for cutting and breaking certain piles, stakes, and hurdles, forming part of a dam of the plaintiffs in the river Kennet. The defendant justified the removing the part of the dam in question, on the ground that it was an enlargement of a dam formerly erected, and that such enlargement obstructed the water formerly allowed to pass by the dam, and which water the defendant claimed a right to in respect of his mill. The plaintiffs stated, in their replication, that the dam was enlarged by them for the purpose of maintaining the navigation of the Kennet, under the powers of an Act of Parliament, 2 stat. 1 G. 1, c. 24. The defendant rejoined, showing that all the Commissioners nominated in the Act of Parliament for the purpose of settling compensation for damages, and all Commissioners subsequently nominated under the Act, were dead, and that no Commissioners were in existence when the dam was enlarged.

The plaintiffs having demurred to this rejoinder, the question arose whether the powers under which the plaintiffs had acted had been lost or destroyed by the *death of all the Commissioners named in the Act or subsequently appointed, and by reason of no Commis- [*539 sioners under the Act being in existence at the time of the making the works mentioned in the replication.

By the 1st section of the Act powers are given to seven persons named in the Act, their heirs, assigns, and nominees, to make the river Kennet navigable, and from time to time to continue, maintain, and use the navigation, and to dig and cut through the banks of the river, and to erect in the river, and upon the lands adjoining or near to the same, weirs, pens, dams, &c., and from time to time to alter, repair, and amend the same, and to do all matters and things which they should think necessary for the making and maintaining the river navigable, or for the improvement and preservation thereof, the said undertakers, &c., *first* giving satisfaction to the owners, &c., of such lands, weirs, mills, tenements, or hereditaments respectively as shall be digged, cut, or removed, or otherwise made use of for the carrying on or effecting the said navigation or for maintaining or managing the same, as the Commissioners named for the purpose should direct, in case the undertakers should not beforehand have agreed with the proprietors of such weirs, mills, lands, tenements, and hereditaments respectively concerning the same.

By the 2d section Commissioners are appointed to mediate between the undertakers and the owners and occupiers of such lands, mills, tene-

(a) Affirming the judgment of the Common Pleas in *Flight v. Buckeridge*, 3 Bing. 215 (E. C. L. R. vol. 11).

ments, and hereditaments, adjoining to or near the river, as should be intended to be made use of, and to settle the satisfaction the parties were to have for such proportion of their lands, &c., as should be cut, digged, removed, or made use of; and powers of settling disputes by a *540] jury are *then given to the Commissioners; and the undertakers, upon payment, "*and not before,*" were authorized to remove, dig, cut, and use the lands, &c.

According to these clauses, the satisfaction to the owners in the manner prescribed was made a condition precedent to the digging and using the lands of the adjoining owners: and, as the non-existence of the Commissioners precludes the assessing satisfaction in the mode prescribed, no powers of this description could be exercised after the Commissioners ceased to exist, except in the case of an agreement between the undertakers and the owners.

This provision for an antecedent satisfaction was properly applicable to the taking and injuring land, the compensation for which could be settled beforehand; but it was not applicable to many cases of consequential damage; and accordingly the Act of Parliament does not include such cases in the provision for compensation to which I have referred. This provision in the 1st section is much narrower than the powers given by that section, and only includes compensation for the direct trespasses to the land which it specifies. It was proper, therefore, to make other provisions for compensation for consequential damages; and this was attempted to be done by the 18th section of the Act. (His Lordship read part of the 18th section; *antè*, p. 536.) The making satisfaction for damages of this description could not be made a condition precedent to the doing the act which might cause the damage; and accordingly in this section provision is made for subsequently ascertaining and settling and recovering such damages.

The damage sustained by the millowner in the present case was of *541] this latter class; and, according *to the intention of the framers of the Act, he ought, *after* the acts done and the mischief sustained, to have had his compensation assessed for the damages which the exercise of the powers had occasioned.

The question is whether, by reason of the mode of assessing the amount of such damage being lost, the plaintiffs have lost the powers expressly given them by the 1st section, and the exercise of which is not made to depend upon a prior satisfaction.

It was argued before us that the Legislature must be taken as impliedly enacting that powers, the exercise of which must be injurious to the millowners, and which the Legislature would not have given without a compensation clause, should cease on the ceasing of the powers of compelling compensation. It could not be said that the making satisfaction was a condition precedent to the exercise of these powers; but it was said that the powers were coexistent with the Commissioners

under the Act, and that the existence of the means of obtaining compensation was a condition precedent to the exercise of the powers.

It appears to me that, if we were to yield to this argument, we should rather be making the Act of Parliament than construing it. The first section gives what may be called two classes of powers: one is to be exercised only on a condition precedent being complied with; the Act is silent as to any prior condition with respect to the other. It is true that, in all probability, the Legislature thought that they had sufficiently provided for the compensation to the millowners; and that, if they had foreseen what has happened, they would not have left the millowners without compensation; but their course probably would have been to have given *the compensation in a more secure way, and [*542 not to have taken away the powers.

Can we properly imply a condition which is to take away the powers expressly given by the statute, because the Legislature have failed in making a sufficient provision for compensation made to parties injured by the exercise of those powers? I find express powers given by the Act, which are clearly sufficient for the purposes for which they have been used. I cannot say that these powers have ceased, by implying a condition, which the Legislature have never contemplated, from circumstances which they had not in their contemplation, and which if they had contemplated, they would, in my opinion, have guarded against, *not* in the way now suggested, by taking away the powers, but by providing some other mode of assessing compensation. If I were to make any implication from what I may speculate upon as to the intention of the Legislature, I should think it a less straining of the Act to imply that in such a case a reasonable compensation should be recoverable, than to imply that the powers were to cease. The Legislature did intend that compensation should be made, though they have failed in the mode of carrying it out; but they neither contemplated nor intended that the powers which may be necessary for the preservation of the very existence of the navigation should cease.

It must be remembered that the non-existence of Commissioners has not happened through the default of the plaintiffs or the undertakers whom they represent. The Commissioners were a distinct body; and it is through their negligence in not filling up vacancies according to the directions of the Act that the mischief has occurred.

*It would be equally hard on the plaintiffs to have the navigation injured through the want of the powers necessary for its [*543 maintenance and preservation as it is for the defendants to sustain the injury to their mill.

Finding that the Legislature have expressly given the powers in question, and that they do not take them away by any express words in the event that has happened, I do not think that I can imply that these powers are to cease because the Legislature have not provided a

sufficient mode for settling and recovering the compensation. If they had given no compensation through inadvertence, the powers would have been good. The case appears to me to be the same when the compensation fails, the powers being given to be exercised before the compensation is to be inquired into.

I have assumed, for the purposes of my judgment, that no mode of obtaining compensation exists; because I think that, even in that case, the law is in favour of the existence of the powers. I do not, however, wish to be considered as saying that there is no mode of obtaining satisfaction. There seem grave objections to the modes which were adverted to in the argument as possible modes of obtaining compensation; (a) but I am by no means certain that some mode may not exist. It is not, however, necessary to decide this point, as I think that the powers do not cease even if all power of obtaining compensation is gone.

I think, therefore, that the rejoinder contains no sufficient answer to the replication, and that the plaintiffs are entitled to our judgment that the rejoinder is bad.

*544] *ERLE, J.—I agree in the judgment of my brother Crompton.

The question in substance appears to me to be, whether the right given by statute to the Canal company, to raise a weir for the necessary purposes of the canal, is taken away by law in the event that the right given to the owner of a mill by the same statute, to recover compensation for consequential damage to his mill through Commissioners, is lost because there are no Commissioners. And I think the answer must be in the negative. The right of the Canal company is given unconditionally; and at the time when the right is exercised it is contingent whether there will be any damage to be compensated. If one of the two parties is to lose his right, the Canal company has the priority in the order of exercising the right; and the owner of the mill can show no reason why his right should be preferred to the rights in the canal, which are both public and private.

Further, there appears to me to be ground for holding that an action would lie against the Company for not making compensation, because, when the right to raise the weir was created, the duty of compensating in case of damage was imposed; and, though a special tribunal for awarding such compensation was created, with a special remedy by a receiver of the tolls, yet, as a right to such compensation exists at common law, and that common right was rather restricted by the statute than created by it, the special remedy may be concurrent with the action at common law, or the common law remedy may be revived upon the failure of the special remedy. But, whether this be correct or not, the plaintiffs seem *to me to be entitled to judgment for the reason before given.

*545] WIGHTMAN, J.—The case, as it appeared upon the pleadings, having

been stated by my brother Crompton, it is unnecessary for me to repeat it.

It being admitted that the compensating power given by the Act of Parliament is gone, the question for our consideration is, whether the power of the Company to make such alterations in their dams and other works as may be necessary for maintaining their navigation is gone also, if such alterations are detrimental to the rights of others acquired subsequently to the constructing of the original dams or works.

The dam was originally constructed and the alterations made under the powers given by the 1st section of 2 stat. 1 G. 1, c. 24. By that section the Company were empowered to make, over or in the river Kennet, such dams and other works as they might think fit, and from time to time to alter the same, and to do all such things as they might think necessary for maintaining the river navigable, or for the improvement or preservation thereof; *first* giving satisfaction to the owners or proprietors of such lands, weirs, mills, tenements, or hereditaments as should be digged, cut, or removed, or otherwise made use of for the carrying on the navigation, as the Commissioners thereafter named should direct, in case the parties could not agree.

Under this clause the defendant would not be entitled to compensation, even if the Commissioners were still in existence, as the condition of "first giving satisfaction" applies only to the actual taking or using the lands, &c., of others, and not to consequential damages arising to *persons whose lands, &c., may be injuriously affected by the acts [*546 of the Company, though not taken or used by them.

But by the 18th section of 2 stat. 1 G. 1, c. 24, it is enacted that, if any person shall happen to sustain any damage in his lands, mills, &c., by the Company raising the water, or diverting or taking away the water, the Commissioners are required to assess the damages by a jury.

This clause for compensation is a separate and independent clause, and not by way of condition either precedent or subsequent to the powers given to the Company by the 1st section of the Act.

The Act contains a provision for the supplying of vacancies in the commission by other Commissioners, to be named by those who remain; but it has happened that all the original Commissioners have died without exercising this power; and, in consequence, no proceeding for compensation can now be taken under the Act.

It appears to me, however, that the neglect of the Commissioners to appoint successors, which is not imputable to any default on the part of the Company, does not affect the right of the Company to do whatever they are empowered to do by the 1st section. It was no doubt intended by the Legislature that compensation should be given in such a case as that in question; but the statute is so framed that the com-

pensation clause cannot be carried into effect. This may be a hardship upon those whose lands or mills are injuriously affected by the works of the Company; but it would be equally hard upon the Company if their navigation was entirely stopped on that account.

*547] *I am therefore of opinion that, as the enabling powers given by the 1st section are not by the Act made subject to the compensating power contained in the 18th section, nor dependent upon it, the Company might lawfully do what they have done; and that the defendant was not justified in pulling down part of the dam; and that the power given by the 1st section to the Company did not cease because another power, given by another independent section of the Act, to recover compensation in case injury was done in exercise of the power given by the 1st section, had expired. The case of *Lister v. Lobley*, 7 A. & E. 124 (E. C. L. R. vol. 34), is an authority in the plaintiffs' favour, showing that an authority given by statute to do acts injurious to the property of another, giving satisfaction for the damage done, is not made void by the failure of the means for obtaining satisfaction pointed out by the statute.

Whether the defendant may, or may not, be entitled to compensation independently of the provisions of the statute, it is not necessary now to consider, as, however that may be, it appears to me that the defendant was not justified in pulling down the part of the dam which the plaintiffs had erected under the authority of the Act of Parliament.

I think that the plaintiffs are entitled to our judgment.

Lord CAMPBELL, C. J.—In this case, unfortunately, I differ from my learned Brothers: but, as, after great deliberation, I strongly entertain a contrary opinion, it is my duty to declare it.

The defendant has a clear answer to the trespasses complained of *548] and is entitled to our judgment, unless *the plaintiffs had a right, under 2 stat. 1 G. 1, c. 24, to raise the dam across the river Kennet, and thereby to cut off the supply of water which, it is admitted, had immemorially flowed for the driving of his mill. If the Board of Commissioners appointed and directed to be continued by the 2d and 3d sections of the statute had been duly continued, so that the defendant might have had compensation for the loss occasioned to him by the raising of the dam, they would have had a right to raise it as they have done, "for the necessary, reasonable, and beneficial use of" the navigation by "boats, barges, lighters, and other vessels." But the question is, whether they could exercise this power to the detriment of the defendant after all the Commissioners named in the statute were dead, and no successors to them had been or could be appointed.

I think that this power was not absolutely perpetual, but depended upon the condition of the Board of Commissioners being duly continued, so that compensation might be given for the very serious loss which the exercise of it might occasion. By the 1st section of the statute two

classes of powers are conferred on the owners of the navigation; one to be exercised upon the soil of others, and another class to authorize acts whereby consequential damage would arise to proprietors on the banks of the river. The granting of compensation through the instrumentality of the Commissioners is expressly made a condition precedent to the exercise of the first class of powers: "the said undertakers, their heirs and assigns, first giving satisfaction to the owners or proprietors of such lands, weirs, mills, tenements, or hereditaments respectively as shall be digged, cut, or removed, or otherwise made use of for the carrying on *or effecting the said navigation." It is quite clear, therefore, that these powers can no longer be compulsorily exercised. [*549]

As the consequential damage arising from the exercise of the second class of powers in some cases could not be foreseen, and the amount of it could hardly ever be justly estimated by anticipation, no previous satisfaction is provided for it: but sect. 18 enacts that, if any person shall sustain any damage in his mills by the owners of the navigation taking away or diverting the water from the said mills, or any similar injury, the Commissioners shall, by a jury impannelled as therein is directed, assess such damage and appoint a receiver of the tolls, who shall, from the tolls received, pay the amount of the compensation assessed to the party grieved.

Although this compensation is to come *after* the act has been done which causes the damage, can it be supposed that the Legislature intended to confer a power of doing such an act after all possibility of obtaining compensation for it has ceased, and has ceased through the default of the owners of the navigation? They had an interest and a duty to keep up the Board of Commissioners: and there can be no doubt that, on their application, this Court would have granted a mandamus, under sect. 3 of the statute, for the appointment of new Commissioners.

Suppose that the clause conferring those extraordinary powers over the property and rights of others had begun with a preamble, "whereas there is provision hereinafter made by the appointment of a Board of Commissioners, whose continuance the owners of the navigation may procure, for making compensation to those who may suffer from the exercise of such powers:" could it *have been contended that these powers might have been exercised after the owners of the navigation, who were to exercise them, had suffered the Board of Commissioners to become irrecoverably extinct? May not the Legislature in the first enactment be supposed to have had in contemplation all the enactments that were to follow? And may not the exercise of the extraordinary powers conferred be fairly considered as made conditional on the owners of the navigation preserving the means of making compensation? We must not suppose that Parliament has enacted what would be most arbitrary and iniquitous, if the language employed by it [*550]

will bear a construction consistent with reason and justice; and, looking to the whole of this statute, I think the meaning of it may fairly be taken to be, that the extraordinary powers which it confers, to seize or injure the property of others, were only to be exercised while the owners of the navigation took care that compensation might be obtained in the manner prescribed. The defendant's mill could no longer be taken from him without his consent for the purposes of the navigation: and why should it be supposed that the Company have now the power of diverting the whole of the water which ought to flow to his mill, whereby his mill may be rendered useless and he himself may be ruined?

The extreme improbability of such legislation being admitted, an attempt was made to argue that the defendant may obtain compensation, although not by means of the Commissioners. But, on the supposition that the act of raising the dam, whereby all the water was diverted from the defendant's mill, was lawful, no satisfactory mode has been pointed out in which compensation can be obtained. It is *551] quite clear that the *common action on the case for wrongfully diverting the water would not lie; for this supposes a conjunction of injury and loss, and here would be an instance of *damnum absque injuriâ*. But it has been suggested that the Legislature must have meant that compensation should be granted; and that an action of *assumpsit* might be supported on an implied promise to make compensation, or in tort for a breach of duty in not making compensation. But, while the statute, by the 18th section, provides compensation in a manner that can no longer be put in use, and anxiously gives an effectual remedy for obtaining payment of the sum assessed, it nowhere else mentions compensation for such a loss as the present. All the powers created by the 1st section, while they exist, are absolute, except as to awarding compensation through the medium of the Commissioners; and, if these powers now exist, they are altogether absolute. How, then, can there be any implied promise to make compensation, and how is any such duty imposed?

The plaintiffs' counsel relied on the case of *Lister v. Lobley*, 7 A. & E. 124 (E. C. L. R. vol. 34), in which this Court intimated an opinion that an action might be maintained for compensation by the owner of houses and lands, after they have been taken under the authority of an Act of Parliament, although trespass would not lie for taking them without having previously made or tendered compensation. But there the Act authorized road trustees to enter upon and take certain lands, and to pull down certain houses, "making or tendering satisfaction to the owners" of all lands and houses so taken "for any loss or damage *552] they *might sustain thereby." Thus a duty was imposed upon the trustees, after taking the land and houses, to make compensation for such loss and damage: and, although for breach of this duty they were not to be considered trespassers *ab initio*, the law would

furnish an easy remedy. In the present case the statute contemplates no compensation, except by an application to the Commissioners: and, as there no longer are Commissioners, if the act of raising the dam was lawful, no compensation can be obtained for the loss which the defendant has thereby suffered. The framers of the statute very possibly did not foresee the extinction of the Commissioners: but I think the intention of the Legislature must be considered to have been that, upon the extinction of the Commissioners, the extraordinary powers conferred upon the owners of the navigation over the property and rights of others ceased. No hardship will follow from the conclusion that thenceforth all parties interested were to continue in the enjoyment of the property and rights which then belonged to them, with the power of voluntarily entering into any new arrangement for valuable consideration. The act of raising the dam might improve the navigation and increase the profits of the shareholders; but it would be strange if such a power existed without any compensation being given to the defendant, whose mill thereby becomes a useless mass of stones, timber, and iron.

It seems to me that the Company acted unlawfully when they raised the dam and cut off the supply of water from the defendant's mill, so that he might have brought an action against them for doing so; and in this action he has a good defence for the alleged trespasses he committed in removing the obstruction which *they had unlawfully [*553 caused to the enjoyment of his rights.

But, as my Brothers are of a contrary opinion, there must be judgment for the plaintiffs.

Judgment for plaintiffs.(a)

(a) Reported in part by C. Blackburn, Esq.

BASTOW v. GANT. *May 22.*

Reported, 13 Q. B. 807 (note) (E. C. L. R. vol. 66).

The QUEEN v. T. J. ARNOLD, Esquire. *May 24.*

The QUEEN v. The Clerk of the Peace and The Treasurer of
MIDDLESEX.

Under stat. 12 & 13 Vict. c. 103, s. 5, if a pauper lunatic, born in Ireland and having no English settlement, is removed to an asylum after five years' residence in a parish in England from which, if sane, he would have been irremovable by stat. 9 & 10 Vict. c. 66, the union, not the county, is liable to the expenses of his removal and maintenance.

PASHLEY moved (a) for a certiorari to bring into this Court, for the purpose of their being quashed, the two following orders made by Thomas James Arnold, Esq., a Police Magistrate of the Metropolis, sitting at the Westminster Police Court within the Metropolitan Police district.

*554] By the first order, dated 3d February, 1852, directed *to The Guardians of the Poor of the Whitechapel Union, Middlesex, within the said district, and to Heaton Ellis, Esq., the Clerk of the Peace for Middlesex, the magistrate recited a complaint made to him by the relieving officer of the Whitechapel Union, "that Luke Cone, a poor person chargeable to the common fund of the Whitechapel Union, is at present legally confined in the Kent County Lunatic asylum, situate at," &c., in the said county of Kent, as a lunatic, at the cost and expense of the common fund of the said Union; and that the said pauper lunatic is not legally settled in any parish in the said Whitechapel Union; and that the said pauper lunatic has not acquired a settlement in any parish or place in England; and that he the said Luke Cone, such lunatic, is an Irishman, and, while resident in the parish of Christchurch in the Whitechapel Union, became chargeable to the said parish for one day, but was afterwards made chargeable to the common fund of the Whitechapel Union by reason of his having resided for five years previously in the said parish, and was sent to the said County asylum from the said Whitechapel Union on the 28th day of May, 1851, and hath ever since been confined in the said asylum: and that, at the time when the said Luke Cone was so sent to the said asylum, he had resided in the said parish of Christchurch for five years and upwards, and would, if not lunatic, have been exempt from removal out of the said parish if he had been chargeable thereto, by reason of the provision of the statute passed," &c. (9 & 10 Vict. c. 66), "if such statute be applicable to the case of an Irishman residing in a parish in England, and who has not gained any English settlement." The order then, *555] after further reciting that Mr. John William *Allen, on behalf of the clerk of the peace, was present in pursuance of notice to the clerk, went on to state that the magistrate, at the request of the relieving officer, had proceeded to inquire upon oath into the circum-

(a) Before Lord Campbell, G. J., Coleridge, Erle, and Crompton, Js.

stances of the case, and it was duly made to appear to him that the premises were true: and he therefore adjudged the same to be true, and did "adjudge the said Luke Cone to be chargeable to the said county of Middlesex, according to the form of the statute in such case," &c. The order was duly served.

The second order, directed to the Treasurer of the County of Middlesex, and dated also on 3d February, 1852, recited the former order, and recited also that proof had been given to the magistrate as to the expenses incurred by the Whitechapel Union in and about the examination of the lunatic, his conveyance to the asylum, his lodging, maintenance, &c.: and it directed the county treasurer to pay the amounts respectively to the treasurer of the Union, and also a certain weekly sum, so long as the lunatic should be confined in the asylum, for his future lodging, maintenance, &c. This order was duly served.

Notice of the present motion was served upon the magistrate and clerk to the guardians by the attorney for the treasurer and clerk of the peace as parties aggrieved by the said orders respectively.

The above facts and documents were verified by affidavit.

Pashley now argued as follows.—By stat. 8 & 9 Vict. c. 117, s. 2 (which, by sect. 7, is to be construed as part of stat. 4 & 5 W. 4, c. 76), Irish paupers chargeable to any parish in England, and not having an English settlement, were removable to Ireland. By stat. 9 & 10 Vict. *c. 66, s. 1, no person other than a pauper lunatic may be removed from a parish where he has resided five years. Stat. 10 & 11 Vict. c. 110, s. 1, reciting the last-mentioned act, provides that all the expenditure which shall be incurred by any parish forming part of a union for the maintenance of any person who shall, within one year before the passing of the recited act, have been in the receipt of relief from some other parish by right of settlement therein, and who, by the recited act, is exempt from liability to removal, shall, during such exemption, be charged to the general fund of such union. That act was to continue in force till October, 1848. Then, by stat. 11 & 12 Vict. c. 110, s. 3, it was again enacted that the costs of relief given to any poor person who, not being settled in the parish where he resided, was or should become irremovable by stat. 9 & 10 Vict. c. 66, should, where the parish formed part of a union, be charged to the common fund of such union during the exemption. This enactment was also limited in duration to September, 1849; in which year stat. 12 & 13 Vict. c. 108 was passed, enacting (sect. 5) that the expenses to be incurred in "obtaining any order of justices for the removal and maintenance of a lunatic pauper who shall have been or shall be removed" by such order to an asylum, "and who, if not a lunatic, would have been exempt from removal by reason of some provision in" stat. 9 & 10 Vict. c. 66, shall, during a specified time, be borne by the common fund of the union comprising the parish where the pauper was resident when removed. This

last enactment was construed, in *Overseers of Wigton v. Overseers of Snaith*, 16 Q. B. 496 (E. C. L. R. vol. 71), to include the expenses of maintenance *as well as those of obtaining the order, and was *557] held, in *Regina v. Priest Hutton*, 17 Q. B. 59 (E. C. L. R. vol. 79), to comprehend a union under Gilbert's Act, 22 G. 3, c. 83. The intention of the Legislature must have been that the enactment in stat. 12 & 13 Vict. c. 103, s. 5, should receive the most general construction.

An Irish pauper, like an English one, would be irremovable, if sane, by stat. 9 & 10 Vict. c. 66; and the consequence is peremptorily fixed by stat. 12 and 13 Vict. c. 103, namely, that the expense of removing and maintaining him, if a lunatic, shall be borne by the union within which he resides.

Bodkin showed cause in the first instance.—Stat. 8 & 9 Vict. c. 126, s. 59, provides that, if a pauper lunatic is not settled in the parish by which he is sent to an asylum, and it cannot be ascertained in what parish he is settled, he shall be adjudged (unless cause to the contrary be shown) chargeable to the county; and sect. 63 points out the course for charging the county treasurer on such an adjudication. The case of an Irish pauper is the same, for this purpose, as the case of a pauper whose settlement is unknown. Stat. 9 & 10 Vict. c. 66, merely makes such a pauper irremovable. Stat. 11 & 12 Vict. c. 110, s. 3, transfers the burden of maintenance from the parish to the union, in cases where the pauper is irremovable by 9 & 10 Vict. c. 66: but neither act takes any notice of cases where no settlement can be found. Nor does the act 12 & 13 Vict. c. 103, s. 5, make any reference to the case *558] of lunatics having no ascertainable settlement, and who are *therefore chargeable to counties under stat. 8 & 9 Vict. c. 126, sect. 59. The concluding words of stat. 12 & 13 Vict. c. 103, s. 5, are “notwithstanding the order for the payment thereof shall have been made upon the overseers of such parish, or the parish of the settlement, or upon the treasurer or guardians of the union in which either parish shall be comprised.” Orders upon county treasurers are not alluded to. One object of the Act, provided for by sect. 3, is, that chargeability to the common fund of a union shall have the same consequences as chargeability to a parish, in respect of proceedings under certain statutes, among which are the statutes for the removal of lunatic paupers to asylums. There was evidently no intention to disturb the enactments of stat. 8 & 9 Vict. c. 126.

Pashley, in reply.—The argument on the other side requires sect. 5 of stat. 12 & 13 Vict. c. 103, to be read as if the words were “for the removal and maintenance of a lunatic pauper, *having a settlement in England*, who shall have been,” &c. It is supposed, for the purpose of the argument, that, if a man has no English settlement, he cannot be “removed” within the meaning of stat. 9 & 10 Vict. c. 66, and therefore is not “exempt from removal by reason” of any provision in that

Act. An Irishman or a Scotchman, having gained no settlement here, is removable to his own country, as an Englishman having a settlement is to his own parish: and stat. 9 & 10 Vict. c. 66, prevents the removal in both cases. [Lord CAMPBELL, C. J.—Ireland or Scotland is quasi the settlement of an Irishman or Scotchman.] The object of the concluding words of stat. 12 & 13 Vict. c. 103, s. 5, is merely to assist the guardians there *mentioned in doing that which would else be done by overseers or guardians acting for the parish of settle- [*559] ment.

Cur. adv. vult.

Lord CAMPBELL, C. J., in the ensuing vacation (June 18th), delivered the judgment of the Court.

In this case the question is raised, whether the expense of maintaining a pauper lunatic who was exempt from removal by five years' residence, and who is without a settlement in England, being Irish by birth, and found to have gained none, is to be borne by the union or the county. And we are of opinion that it is cast upon the former by stat. 12 & 13 Vict. c. 103, s. 5, enacting that the costs of the order for removal and maintenance in the case of a lunatic pauper so exempt shall be borne by the union.

This is admitted in the case where the lunatic pauper has a settlement; and, if full effect is given to the words, they include also lunatic paupers who have no settlement. In the first case they transfer the burden from the parish of settlement to the union within which the five years' inhabitancy took place, upon the principle that such inhabitancy has many of the properties of a settlement: and we see no reason why the Legislature should not have intended to make a transfer from the county to the union in the latter case, as it has used words wide enough so to operate, and the reason for the transfer applies equally in both cases.

Rule absolute.

The orders being returned under the certiorari, *Pashley* in the ensuing Michaelmas term obtained a rule to show cause why they should not be quashed. *In the same term (November 17th) *Atherton* (with whom was *Bodkin*) stated that he had instructions to support the orders. [*560] [Lord CAMPBELL, C. J.—As there can be no writ of error, you may argue for the purpose of showing that we ought to review our judgment; but our opinion was formed upon argument, and after taking time to consider.] *Atherton* then said that he had no fresh grounds to urge, and could not hope to alter the decision of the Court. [COLERIDGE, J.—We felt all the difficulty that arose in the case, and considered it carefully.]

Per Curiam.(a)

Rule absolute.(b)

(a) Lord Campbell, C. J., Coleridge, Wightman, and Erie, Js.

(b) Stat. 12 & 13 Vict. c. 103, s. 5, is repealed by stat. 16 & 17 Vict. c. 97, s. 102; and a similar provision is thereby made in its stead for the case of a pauper lunatic who would have been exempt from removal "to the parish of his settlement or the country of his birth," under stat. 9 & 10 Vict. c. 66.

ALLAN and Another v. LAKE. May 25.

Defendant, by his agent, sold plaintiffs a parcel of turnip seed, and gave the following sold note: "Mr. T. C. R." [defendant's agent]. "Sold to Messrs. B. & Co." [plaintiffs] "for Mr. C. L." [defendant], "14 quarters Skirving's Swedes at 17s. per bushel." Defendant's agent afterwards sold plaintiffs a second parcel of turnip seed, stating that it was "of the same stock" as the first parcel. No sold note was given; the invoices described it as "24½ quarters of turnips."

Held: As to the first parcel, that the jury was properly directed that the description of it in the sold note amounted to a warranty that it was Skirving's Swedes.

As to the second parcel, that the statement of defendant's agent that it was "of the same stock" as the first, on the subsequent sale to plaintiffs, was evidence for the jury of a warranty that the second parcel also was Skirving's Swedes.

CASE. The 1st count stated that plaintiffs, on 1st May, 1850, bargained with defendant to buy of him the produce of six acres of turnip seed for the price of 136s. for each quarter of the said seed; and defendant, in the *course of the said bargaining, falsely warrant-
*561] ing the said seed to be of a kind called Skirving's Swedes turnip seed, induced plaintiffs to buy and accordingly then sold the same to plaintiffs; whereas in truth and in fact the said seed so sold was not, at the time of the said warranty as aforesaid, of the said kind called Skirving's Swedes turnip seed, but of another and different kind, and inferior to, and less valuable than, Skirving's Swedes turnip seed. The second count was similar to the first, except that it related to a second parcel of turnip seed, the produce of four acres. The declaration then averred that by means of the said several premises defendant falsely and fraudulently deceived plaintiffs on the said several sales; and alleged special damage.

Plea: Not guilty. Issue thereon.

On the trial, before Lord Campbell, C. J., at the London sittings after Easter term, 1852, it appeared that the plaintiffs were seedsmen in London, trading under the name of Beck and Co., and the defendant was a farmer. In May, 1850, one of the plaintiffs, in company with Reed, a cornfactor and agent for the defendant, saw six acres of turnips belonging to the defendant in bloom, and agreed to buy the seed produced by that crop. On 3d August, 1850, fourteen quarters of turnip seed, the produce of the six acres in question, were delivered to the plaintiffs; and the following sold note was given to them shortly after.

"Mr. T. C. Reed.

Aug. 5, { Sold to Messrs. Beck & Co. for Mr. C. Lake 14 quarters
1850. { Skirving's Swede @ 17/ per bushel."

*562] *The note was accompanied by the following invoice:

«Messrs. Beck & Co.

1850.	To C. T. Reed,	
August 5.	14 quarters Turnip @ 186/	£94 4 0
Short	.	14 10
		£94 9 2'

A few days afterwards another parcel of turnip seed was sold by Reed to the plaintiffs, Reed stating it to be of the "same stock" as the former, and calling it Skirving's Swedes. No bought or sold note was given on this occasion. The invoices described the seed as "24½ quarters of turnips."

In May, 1851, samples of the two parcels of seed were sown by the plaintiffs. The crop partly failed; and of those plants which made their appearance the greater part were not of the description called Skirving's, but of an inferior and spurious kind.

It was objected, on behalf of the defendant, that the plaintiffs ought to be nonsuited on two grounds; first, that, as regarded the first parcel of seed, the sold note did not amount to a warranty by the defendant that the seed was Skirving's Swedes, but contained merely a representation or description of it by that name; secondly, that there was no evidence for the jury that the second parcel had been warranted to be Skirving's Swedes, the invoice describing the seed merely as 24½ quarters of turnips. The learned Judge overruled both objections; and the jury found a verdict for the plaintiffs for the value of the seed, leave being reserved *to move to reduce the damages by the value of [*563 the second parcel, if the Court should think there was no evidence for the jury of that parcel having been sold under a warranty of its being Skirving's Swedes.

Hoggins now moved accordingly, and also for a new trial on the ground of misdirection upon the first count.—First, the Lord Chief Justice misdirected the jury in laying down, as matter of law, that the statement in the sold note amounted to a warranty of the seeds being Skirving's Swedes. It was no more than a mere description of the article sold. In *Budd v. Fairmaner*, 8 Bing. 48 (E. C. L. R. vol. 21), a receipt for a horse sold, describing it as "a grey four year old colt, warranted sound in every respect," was held not to amount to a warranty as to the age. Even supposing the sold note to amount to a representation that the article sold was of a certain description, that would not necessarily be a warranty; *Chandelor v. Lopus*, Cro. Jac. 4, *Power v. Barham*, 4 A. & E. 478 (E. C. L. R. vol. 81); nor could the plaintiff recover on that representation unless it were false to the knowledge of the defendant. In *Ormrod v. Huth*, 14 M. & W. 651,† where cotton was sold on a representation that the bulk corresponded with the sample, no actual warranty being given, and the cotton proved to

be of inferior quality, it was held that an action for a false and fraudulent representation could not be maintained without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. In the present case *564] there was no evidence of fraud or mala fides on the part of the defendant, or of his knowledge that the representation made by him was false. The question whether, in this case, the sold note contained a warranty or not depended upon the question, which should have been left to the jury, whether the statement of the seed being Skirving's was treated by the plaintiffs as material or not. Had the jury found that it was, and that the seed was not Skirving's, then, and not till then, it was competent for the Judge to say that the statement amounted to a warranty. If, indeed, the sold note had contained the words "*warranted Skirving's*," the Judge would have been justified in construing the contract without the assistance of the jury, and in directing them that the note amounted to a warranty, and that the only question for them was whether or not the seed was Skirving's. Again, supposing the jury to have found that the question whether the seed was Skirving's was not regarded by the plaintiffs as material to the value of the contract, a further question for their consideration would have been, whether the seed was turnip seed, and of merchantable quality; *Gardiner v. Gray*, 4 Campb. 144. Possibly the plaintiffs would have considered the statement in the sold note to have been complied with if the seed had been of a description equal to Skirving's, although it were not actually Skirving's. The language of the breach in the declaration is material as to this. It avers that the seed was not Skirving's turnip seed, "but of another and different kind, and inferior to and less valuable than, Skirving's Swedes turnip seed." The substance of the issue here is, not that the seed was not Skirving's, but *565] that it was inferior and less valuable. **Edge v. Pemberton*, 12 M. & W. 187,† shows how a breach averred in this manner narrows the issue.

Next, as regards the second parcel of seeds, the defendant is clearly entitled to a verdict; for there was no warranty at all events of that parcel. There was no sold note, but merely two invoices which described the seed as "24½ quarters of turnips." [Lord CAMPBELL, C. J.—The defendant's agent stated the second parcel to be of the "same stock" as the first parcel, which was represented to be Skirving's. That was evidence for the jury that the second parcel also had been warranted to be Skirving's.] The contract was contained in the invoices, and could not be varied by verbal evidence.

COLERIDGE, J.—I think there is no ground for a rule in this case. As regards the first parcel, there is no doubt that the statement in the sold note, that the seed was Skirving's Swedes, was made by the defendant part of the contract. Then, is that statement a warranty or a

mere representation? I think it is a warranty. If it had been limited to an assertion that the seed was turnip seed, that would without doubt be a warranty of the seed being turnip seed. And, in like manner, when the defendant described the seed as Skirving's, he undertook that it should answer that description. Then, as to the second parcel, I think there was evidence for the jury of a warranty that the seed was Skirving's. If, as has been contended, the invoices formed the whole contract, there would have been no warranty to that effect. But the invoices were not the contract. It was proved that the defendant's agent stated that the second *parcel of goods was to be of the "same stock" as the first. These invoices are merely bills, and [*566 suppose the existence of a previous contract. Then, if we look at the fact of the sale of the first parcel as Skirving's Swedes, and add to this the defendant's statement that the second parcel was to be of the "same stock," we must say that it was a question for the jury whether there was not a warranty, as to that second parcel, that the seed should be Skirving's.

ERLE, J.—I am of the same opinion. As to the first parcel of seeds, I think there was clearly a warranty. The question is, whether the vendor did not contract to sell and deliver seeds that should answer the description of Skirving's Swedes. The statement that the seeds were Skirving's was, in one sense, mere matter of description: but it was a description of a known article of commerce; and the defendant was not at liberty to substitute another sort of turnip seed which did not answer that description. He could not vary from that contract as regarded the seeds being Skirving's any more than he could with regard to their being Swedes. As to the second parcel, the question is, what was the denomination of the article sold. The contract was verbal; and it was for the jury to say if it was intended by the parties to import into the contract the assertion by the defendant's agent that the second parcel of seeds should be of the same stock as the first, namely, that they should be Skirving's Swedes. When a vendor gives a description of the properties of an article, it is a question for the jury whether such description is a mere commendation of the article, or a direct representation that he sells it as being the particular article *described. The invoices did not, as has been contended, con- [*567 stitute the contract: an invoice assumes a pre-existing contract, which, in the case of the second parcel, was a verbal one only.

CROMPTON, J.—I concur with the rest of the Court upon both points. With respect to the second parcel, the fact of there being a previous contract for a parcel of Skirving's Swedes, and the fact that the second parcel of seed was stated to be of the same stock as the first, were evidence for the jury of an intention by the parties to the contract that the second parcel should be Skirving's Swedes. The contract was complete before the invoices were delivered. No doubt, if a contract is in

writing it cannot be varied by evidence of a further verbal agreement. Here the contract was verbal only: the invoices formed no part of it. And, even if the contract be in writing, where the goods turn out to be of inferior quality to the sample, the purchaser has, on the authority of *Meyer v. Everth*, 4 Campb. 22, a remedy by action on the case for a deceitful representation, although the sold note contain no reference to the sample.

Lord CAMPBELL, C. J.—As regards the first parcel, I adhere to the opinion which I expressed at the trial, that the statement in the sold note amounted to a warranty that the seed was Skirving's Swedes. I also agree with the rest of the Court in thinking, with respect to the second parcel, that there was evidence for the jury of the defendant *568] having warranted them *also to be Skirving's Swedes. It is clear that the invoices did not form the contract. There was a previous verbal contract for the sale of the second parcel; and, the defendant's agent having stated that the second parcel was of the same stock as the first, that statement became part of the contract.

Rule refused.

Sir LAWRENCE VAUGHAN PALK, Baronet, v. SHINNER.

May 25.

Under stat. 2 & 3 W. 4, c. 71, ss. 7, 8, the time during which the servient tenement has been under lease for a term exceeding three years is to be excluded from the computation of a fifty years' enjoyment, but not from the computation of an enjoyment for twenty years.

CASE. (Action commenced 1st September, 1851.) The declaration stated that one James Soper, before and at the time, &c., was possessed of a certain messuage, &c., and appurtenances, the reversion of and in the same then and still belonging to plaintiff; that, before and at the time of the committing, &c., the plaintiff, the said J. S., and all tenants and occupiers of the aforesaid messuage, of right "have had and used, possessed and enjoyed, and still of right ought to have and use, possess and enjoy, a certain way, to wit, for himself and themselves, and his and their servants, on foot, and with horses," &c., "and with carts and other carriages, every year and at all times," &c., "at his and their free will," &c., "from and out of the said messuage or tenement, farm, lands, hereditaments, and premises, unto and into, through, over, across, and along a certain other close," &c., "and, from and out of the same, unto and into a certain common public highway, to wit," &c., "and *569] from thence back again," from the said highway, *unto, into, &c., the last-mentioned close, unto and into the said messuage, &c., "for the more convenient occupation of the same." Breach: that defendant, wrongfully intending to injure plaintiff in his said rever-

sionary estate and interest, &c., heretofore, to wit, on 1st June, 1851, and whilst the same was so in the possession and occupation of J. Soper, and whilst plaintiff was so interested as aforesaid, injuriously, wrongfully, &c., against the will of plaintiff, greatly and permanently encroached upon, encumbered and obstructed the said way, to wit, by placing blocks of stone, &c., and so continued such obstruction from thence hitherto, whereby the reversion of plaintiff is greatly and permanently injured and lessened in value.

Pleas: 1. Not guilty. Issue thereon.

2. That plaintiff, at the said time when, &c., did not of right have or use, possess or enjoy the said way, in manner, &c. Issue thereon.

On the trial, before Erle, J., at the last Devonshire Spring Assizes, the plaintiff proved the interruption, and gave evidence to show a user of the way for twenty years. It appeared that the land, over which the right of way was claimed, had been demised in 1831 for a term of fourteen years, and again, in 1838, by a fresh lease, for a term of eight years, ending in 1846. No resistance had been made to the user at any time during or after the determination of the leases. The learned Judge, as to the user, left it to the jury to say whether or not the plaintiff had enjoyed the right of way from time immemorial or for twenty years, as of right; and, as to the twenty years, he told them that the fact of such lease having existed during part of that period would not defeat the plaintiff's right of user, under stat. *2 & 3 W. 4, c. 71. The jury found that there had been a twenty years' user, and gave [570 a verdict for the plaintiff.

Kinglake, Serjt., in last Easter Term, obtained a rule Nisi for a new trial, on the ground of misdirection.

Crowder and *Collier* now showed cause.—The question is whether, under stat. 2 & 3 W. 4, c. 71, in establishing a user for twenty years as against the reversioner of the servient tenement, the time during which such tenement was on lease for any term of more than three years is to be excluded from the computation of the twenty years' user. This point has not been raised before. It depends upon the construction of sects. 7 and 8 of the Act, taken in connexion with sect. 2. The object of sect. 2 is to give to a user of twenty years the same effect as that of a custom, a prescription or a grant, but providing that the claim by such user shall not be defeasible by proof of origin at some time prior to the twenty years; and to make the right arising from a user of forty years absolutely indefeasible, except where such right has been enjoyed "by some consent or agreement expressly given or made for that purpose by deed or writing." Sect. 7 provides, among other things, that the time during which any person, otherwise capable of resisting any claim to a right of way, shall have been or shall be a tenant for life shall be excluded in the computation of the "periods hereinbefore mentioned," except in cases where the right or claim is by the Act declared to be

absolute and indefeasible. Sect. 8 provides "that when any land or water upon, over, or from which any such way or other convenient(a) *571] *watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof." Now, first, even supposing that the intention of sect. 8 was to exclude a tenancy for years in the computation also of an user for only twenty years, no such exclusion could be made here, inasmuch as the reversioner has not resisted the claim within the three years directed by the statute. But, secondly, sect. 8 does not admit of such a construction. The only authority in support of it is an observation of Parke, B., in *Bright v. Walker*, 1 C. M. & R. 211,† S. C. 4 Tyr. 502. But that was an obiter dictum only; and no reason is given for the position laid down. [CROMPTON, J.—The learned Judge there said that a life tenancy must, à fortiori, be excluded from an user of twenty years: I should rather have thought the intention of the statute had been to control only that description of user which is the nearest to being indefeasible.] That would appear to be the right construction. In *Bright v. Walker* moreover, the tenancy which was excluded was a life tenancy, not a tenancy for years. And the tenancy had continued up to the time of the *572] *obstruction for which the action was brought: here it expired three years before.

Kinglake, Serjt., and *Montague Smith*, contra.—There can be no doubt as to the construction of sect. 7, which expressly directs a life tenancy to be excluded in the computation of any of the periods therein-before mentioned (one of which is a twenty years' user of a right of way) except where the right or claim is by the Act declared to be indefeasible, one of which exceptions is a forty years' user of a right of way. As regards that exception, sect. 8 provides that a life tenancy is to be excluded in the computation of it only if the claim be resisted by the reversioner within three years after the determination of the term. The intention, therefore, clearly is to exclude a life tenancy absolutely in the case of a twenty years' user, and conditionally in the case of a forty years' user. That is the view taken by the Court of Exchequer in *Wright v. Williams*, 1 M. & W. 100,† S. C. Tyr. & G. 375. And *Wightman, J.*, in *Pye v. Mumford*, 11 Q. B. 666, 672 (E. C. L. R. vol. 63), appeared to be of opinion that the construction in favour of the

(a) Probably a misprint for "convenience," or "easement." See *Wright v. Williams*, Tyr. & Gra. 375, 390; *Gale on Easements*, p. 103 (Ed. 2).

exclusion of a tenancy for a term of years from the computation of a thirty years' user, though not expressly directed by the Act, was correct. The statute declares that a user for twenty years may still be defeated by any of the old methods except proof of enjoyment for a less period than from time immemorial: it may therefore be defeated, as before, by showing that the owner of the servient tenement had not the fee during the whole of the twenty years. The observations of Wightman, J., in *Pye v. Mumford* are in accordance *with this [573] view. [Lord CAMPBELL, C. J.—Would an old prescriptive right be so defeated?] If there had been a succession of leases, and no evidence of user before such succession, the jury could not, before the Act, have been directed to presume the prescriptive right against the owner in fee. [CROMPTON, J.—Suppose the owner of the inheritance had consented by parol.] It has been held that proof of a written parol license will defeat a forty years' user, and proof of a mere verbal license a twenty years' user; *Tickle v. Brown*, 4 A. & E. 369 (E. C. L. R. vol. 31), *Beasley v. Clarke*, 2 New Ca. 705 (E. C. L. R. vol. 29). [Lord CAMPBELL, C. J.—Assuming that sect. 8 applies to a user for twenty years, what answer is there to the objection that no resistance has been made by the reversioner, in the present case, within three years after the determination of the lease?] That condition in sect. 8 applies only to the case of a forty years' user, and was introduced for the purpose of fixing a time within which the absolute right might be defeated.

Lord CAMPBELL, C. J.—I am of opinion that the plaintiff is entitled to our judgment. I think that there was evidence from which the jury might find that he was entitled to claim a right of way under sect. 2 of stat. 2 & 3 W. 4, c. 71. I do not say that the evidence was conclusive; but it was sufficient to justify their finding; and that finding ought not to be disturbed unless the plaintiff's claim is defeated by sect. 8. I am of opinion that it is not. The period during which the land over which the right of way is claimed has been *leased for a term exceeding three years is not, under that section, to be excluded from [574] the computation of a twenty years' enjoyment, though it is, no doubt, to be excluded from the computation of an enjoyment for forty years. Sect. 7 excludes certain times, including that of a tenancy for life, but not that of a tenancy for years, from the computation of the "periods" thereinbefore "mentioned;" and a twenty years' enjoyment is one of those periods. But sect. 8 provides for the exclusion of certain other times, among which is a tenancy of more than three years, not from the periods thereinbefore mentioned, but from one particular period only, expressly mentioned, namely, that of an enjoyment for forty years. It is clear, therefore, that it was not intended to exclude them from the computation of an enjoyment for twenty years. Great reliance was placed upon *Bright v. Walker*, 1 C. M. & R. 211,† S. C. 4 Tyr. 502;

but, on examination into that case, it appears that there was no necessity for the Court to give any opinion as to the effect of sect. 8; for the right of way there claimed was clearly destroyed, under sect. 7, by reason of a tenancy for life. But, even supposing sect. 8 to apply to a twenty years' enjoyment as well as to an enjoyment for forty years, the right by enjoyment in the present case is not destroyed, inasmuch as the condition, that the claim shall be resisted by the reversioner within three years after the determination of the tenancy for years, has not been complied with.

COLERIDGE, J.—Putting out of consideration sects. 7 and 8, there was *575] clearly evidence for the jury of a twenty years' user, as of right, before the commencement of the action. That being so, we must look to sects. 7 and 8 to see whether that period of twenty years is to be shortened by excluding the period during which the tenancy for years existed. Now, sect. 7 applies in terms to a twenty years' enjoyment, for the purpose, not of defeating the right, but of excluding certain periods from the computation of the twenty years. But a tenancy for years is not one of those periods, although a life tenancy is. Then, sect. 8 does exclude a tenancy for years, but excludes it only from the computation of a forty years' enjoyment. There being one section applicable to a twenty years' enjoyment, and another expressly confined to a forty years' enjoyment, it would be unreasonable to import the latter into the former, and make sect. 8 apply to a twenty years' enjoyment also. But, even if it did so apply, the tenancy for years cannot be excluded in the present case, the reversioner having made no resistance within three years from the determination of the term.

ERLE, J.—If this case had arisen before the statute, there would have been good evidence to go to the jury of a user as of right for twenty years, notwithstanding the existence of the tenancy for years. And the question is still to be left to the jury in the same way; for the statute makes no difference in the various modes of defeating the user, except as it provides that it shall not be defeated by proof of origin at some time prior to the twenty years. The question then arises whether, under sect. 8, the tenancy for years is to be excluded from the computation of twenty years' enjoyment. That section applies expressly to *576] the computation of an enjoyment for forty years; and it would be contrary to all rules of construction to hold that it applies also to the computation of an enjoyment for twenty years. The only possible ground for such a conclusion is found in *Bright v. Walker*, 1 C. M. & R. 211,† S. C. 4 Tyr. 502. But there the question was as to the exclusion of a tenancy for life, and the Court was clearly right in holding that such tenancy must be excluded from the computation of a twenty years' enjoyment. It is so excluded under sect. 7; and I do not see that its exclusion is made more clear by sect. 8. But I do

not think the learned Judge ever meant to say that a tenancy for years must be excluded from the computation of an enjoyment for twenty years. (a)

Rule discharged.

(a) Crompton, J., was absent.

The QUEEN v. AVERY. May 26.

Under stat. 5 & 6 W. 4, c. 76, s. 32, which requires the voting paper at an election of borough councillors to be signed with the name of the burgess voting, the party's usual signature is sufficient; and it is no valid objection that the Christian name is denoted only by an initial. Such paper is correct according to sect. 32, if the place in respect of which the party votes, and for which he appears to be rated on the burgess roll, be described according to its actual situation, though the description may vary in terms from that on the burgess roll.

QUO WARRANTO for exercising the office of a councillor of the borough of Barnstaple. Plea, that, defendant being a person qualified, and a candidate, for the said office at an election of three councillors held on November 1st, 1851, it was then ascertained that he was one of the three persons having the greatest number of votes; and he was deemed to be and was then and there *elected, &c.; and that his name [*577 was published accordingly, and he subscribed the declaration, &c.: verification. Replication, denying that it was ascertained, &c., in manner and form, &c.: or that defendant was one of the three persons having the greatest number of votes, in manner, &c.: or that he was elected a councillor, &c., in manner, &c. Issues to the country were joined on these several traverses.

On the trial before Erle, J., at the Devonshire Spring assizes in this year, it appeared that, at the close of the election, Avery stood third upon the poll, and one King, fourth, the numbers declared being for Avery 282, and for King 274; but it was contended that King had more legal votes than Avery. The following among other objections to the votes given for Avery were relied upon for the prosecution.

1. That the Christian name or names of the voter were designated on the voting paper by initials only; as "J. S. Clay;" "A. T. Powning." The Burgess roll contained the names "John Sherard Clay" and "Ambrose Toop Powning." Erle, J., referring to *Regina v. Hartlepool*, 2 Lowndes, M. & P. 666, held these signatures sufficient.

2. That a voter who resided in a portion of Pilton parish, forming part of the North ward, signed his voting paper "John Cann, Pilton;" whereas in the Burgess roll of voters for the North ward his rated property was described (under the head of "Pilton") as follows: "Cann, John. House: *In the Street*." Another voter, whose rated property was similarly described on the roll, signed himself "James Cooksley, Pilton Street." It appeared that Pilton contained more than one street,

*578] *but that the place in which these persons lived was known in Barnstaple as "Pilton Street" or "The Street, Pilton." Erle, J., held the paper sufficient.

Both objections applied to several votes.

A verdict having been found for the defendant, *Slade*, in last Easter term, moved (by leave reserved) that a verdict might be entered for the Crown, on the ground that the above stated objections ought to have been held fatal. He relied also on some others, which it is unnecessary to set forth.

Crowder and *Taprell* now showed cause.—As to the first class of objections. Stat. 5 & 6 W. 4, c. 76, s. 32, directs that the voting paper shall contain the Christian and surnames of the persons voted for, but requires only that it be "signed with the name of the burgess voting." [Lord CAMPBELL, C. J.—Would the surname alone be sufficient?] At least the surname with the initials of the other names, or contractions of them, according to the party's usual mode of signing, would satisfy the intention of the Legislature. The present form is, at any rate, only a "misnomer or inaccurate description," which, by sect. 142 of the same statute, does not vitiate, "provided that the description," of person or place, "be such as to be commonly understood." [COLERIDGE, J.—Is this a description at all?] If it serves to identify the party, its purpose is answered. And, under this Act, sect. 34, the voter who delivers the paper, may be asked if he is the person whose name *579] is signed to it. (a) A will or a bond *would be sufficiently signed though the Christian names of the party executing were denoted only by initials. [COLERIDGE, J.—It will be said that "name" in this Act must mean more than surname. Lord CAMPBELL, C. J.—You are not driven to contend that the surname alone would be sufficient. It may be said that the initials are a short way of stating the Christian name. (b)] Where the Legislature requires Christian names to be given in full, express words to that effect are used, as in the Parliamentary Reform Act, 2 & 3 W. 4, c. 45, s. 38, the Act for Registration of voters, &c., 6 & 7 Vict. c. 18, s. 13, and the Act as to duties on newspapers, 6 & 7 W. 4, c. 76, s. 14. Under the Uniformity of Process Act, 2 & 3 W. 4, c. 39, s. 12, which requires writs to be endorsed with the "name and place of abode" of the attorney suing them out, it has been held that the Christian name need not be signed, and that the name of a firm is sufficient; *Pickman v. Collis*, 3 Dowl. P. C. 429, *Hartley v. Rodenhurst*, 4 Dowl. P. C. 748. So under stat. 24 G. 2, c. 44, s. 1, which directs that notice of action against a justice shall be

(a) It was also urged that the particular voters in this case were well known in Barnstaple; but it was answered, and finally admitted, that the sufficiency of the signature was decided upon at the trial purely as a matter of law. See *Regina v. Hammond*, 17 Q. B. 772, 783, 4 (E. C. L. R. vol. 79).

(b) Sir F. Theiger, for the relator, admitted, in the outset of the argument, that a contraction denoting the Christian name (as Saml. for Samuel) might suffice.

endorsed with the attorney's name, it was held that the surname at length, and an initial in place of the Christian name, were sufficient; *Mayhew v. Locke*, 7 Taunt. 63 (E. C. L. R. vol. 2), *James v. Swift*, 4 B. & C. 681 (E. C. L. R. vol. 10), *Holroyd, J.*, in the latter case thought that the word "name" did not even require the Christian name to be denoted at all; a view which appears to have been also taken by *Parke, B.*, in *Roberts v. Williams*, 2 Cro. M. & R. 561, 562,† S. C. 5 Tyr. 583, 584. And *James v. Swift* was recognised as an authority in **Smith v. Brown*, 1 Cro. & J. 542,† S. C. 1 Tyr. 486, where the bill of two attorneys was held to be properly signed within stats. [580 3 Ja. 1, c. 7, s. 1 (which requires subscription with the attorney's "own hand and name") and 2 G. 2, c. 23, s. 23, though the surnames only appeared. Designation of parties in pleading by initials in place of the Christian names is sanctioned by the Law amendment Act, 3 & 4 W. 4, c. 42, s. 12. The admissibility of initials in cases not falling within that section has been much discussed; and a distinction has been drawn between a consonant initial and a vowel initial.(a) [Lord CAMPBELL, C. J.—That has been questioned here.(b)] That objections founded on misnomer are not favourably considered, where there is sufficient certainty as to the person, appears by *Sir Moyle Finch's Case*, 6 Rep. 63 a, 65 b. *Regina v. Hartlepool*, 2 Lowndes, M. & P. 666, is an authority a fortiori: there a notice of claim to be put upon the burgess list had been served under stat. 5 & 6 W. 4, c. 76, s. 17, in the name of A. W. Dobing: the schedule (D) to that Act referred to by sect. 17, gives a form which the claim ought to pursue, and which requires the "Christian and surname of each claimant:" yet *Erle, J.*, held that the claim had been improperly rejected on account of the initials, and granted a mandamus, under stat. 7 W. 4 & 1 Vict. c. 78, s. 24, to insert the name.

Sir F. Thesiger, Attorney-General, *Slade*, and *Montague Smith*, contrà.—The intention of the *Legislature in stat. 5 & 6 W. 4, c. 76, was that elections should be conducted with facility and [581 certainty, for which purpose it was essential that the voter's name should be inserted at full length in his paper, so that he might with the greatest ease be identified, not merely in small boroughs where the party might be recognised by a slight description, but in larger ones, containing great numbers of persons unknown to each other. The voting paper ought to correspond with the burgess list, which, by sect. 15, and schedule D. there referred to, is required to show the Christian name and surname at full length, so as to leave no doubt of the identity. This made it unnecessary to repeat an express direction on the same head in sect. 32, though it enacts that the paper shall contain the Christian

(a) See *Lomax v. Landells*, 6 Com. B. 577 (E. C. L. R. vol. 60); *Kinnarsley v. Knott*, 7 Com. B. 980 (E. C. L. R. vol. 62).

(b) *Regina v. Dale*, 17 Q. B. 64 (E. C. L. R. vol. 79).

names and surnames of the candidates voted for, no previous intimation having been given on that subject. The paper does not of itself identify the voter, except by the words appearing on it. [Lord CAMPBELL, C. J.—The Act directs only that the paper shall be signed with the burgess's name. It does not even say that he himself shall sign it.] He might be unable to do more than make his mark; but that would not satisfy the Act. [Lord CAMPBELL, C. J.—A signature according to common usage seems to be all that is required.] It is suggested that questions may be put to the voter under sect. 34: but that is only if two electors require it; and the burgesses do not see the voting paper at the time of the election. It is evident that great uncertainty must arise from the use of initials where several Christian names begin with the same. Suppose the name on the burgess roll to be Joseph Smith; a voter coming up with a paper signed J. Smith may be asked the three *582] questions prescribed in sect. 34, *and no others: he may reply, truly or not, that he is the person whose name appears as Joseph Smith on the burgess roll: a second and a third voter with papers similarly signed may give the same answer; and it will be impossible to determine, from the papers, whose vote ought to stand. [Lord CAMPBELL, C. J.—The same difficulty would arise if there really were two persons named Joseph Smith, giving full signatures.] The enactment in sect. 142, that no "misnomer or inaccurate description" shall prejudice, provided "the description" of the "person," &c., "be such as to be commonly understood" seems applicable to cases where some "description" is to be given beyond the mere name of the party. The defect here is not a misnomer, but a want of name; it is not even the case of a contraction, as Thos. for Thomas, which might be sufficient. It is not an inaccurate description, but a failing to describe. The clause was intended to cure something wrong: here the designation, as far as it goes, is right. [Lord CAMPBELL, C. J.—May not it be said that a defective description is an inaccurate description?] Regina v. Hartlepool, 2 Lowndes, M. & P. 666, differed entirely from this case. There a burgess had sent his notice of claim to the town clerk, giving initials only for the Christian names. The case states that, for this defect in the notice, the mayor and assessors refused to enter the name in the burgess roll. But it does not appear that the town clerk may not have sent in the full names, which were generally known in the borough; and, if he did so, it was not the duty of the mayor and assessors to look at the notice of claim. The town clerk, under sects. 17 and 18, *583] produces, not the notices, but *his list of claimants; and, in the case cited, though the notice was imperfect, the clerk might have supplied the omission from evidence, or from his own knowledge. The mayor and assessors themselves receive evidence, when making up their lists under sect. 18, and are to "correct any mistake or supply any omission which shall be proved to the Court to have been made in any

of the said lists in respect of the name or place of abode of any person who shall be included in any such list." The notice in that case was not contrary to the direction of sect. 17, which requires only that it shall be "according to the form" in schedule (D) "or to the like effect." The argument for the defendant would show that in the Hartlepool case initials for all the names might have sufficed, if they had been understood by the town clerk. The object of the statute is to insure that the name on the voting paper shall be the same as that on the burgess list; and this is to be effected on the principles laid down by Wilde, C. J., in Eidsforth, appellant, Farrer, respondent, 4 Com. B. 9, 15 (E. O. L. R. vol. 56). "The Court would deem it to be its duty equally to avoid requiring what the statute itself does not require, as to avoid encouraging the omission of that which the statute does require; and it is essential, in the construction of this Act, especially to lay down such broad and distinct rules as may be intelligible to the minds of those whose conduct is to be guided by them." [Lord CAMPBELL, C. J.—Besides the Hartlepool case there is a long list in which the name has been required by statute, but initials for the Christian names have been held sufficient.] They all stand upon grounds not applicable to a case like this, *where a party delivers his name for the purpose of giving validity to his own act. As to firms, the surnames of [*584 the partners are the name of the firm: it is known by them and not by the Christian and surnames. The simple question here is, what the Court will hold to be the "name of the burgess voting," within sect. 32 of stat. 5 & 6 W. 4, c. 76.

Lord CAMPBELL, C. J.—I have not been able to entertain a doubt in this case. Stat. 5 & 6 W. 4, c. 76, s. 32, directs the mode of voting by delivery of a voting paper, "such paper being previously signed with the name of the burgess voting:" and the question is, whether the papers in this case, containing the surname of the voter, and giving, for the Christian names, initials by which the voter was known in Barnstaple, were "signed with the name" according to sect. 32. We must give the act that interpretation which would be put upon it by any person reading it according to the grammatical construction and the ordinary force of words. The requisition is that the paper be "signed," that is, by the voter or some person for him: and what is intended to be the signing? Clearly that it should be done in the ordinary mode in which he signs his name: and here we must take that ordinary mode to be writing the surname in full and denoting the Christian name by an initial. A testator may sign in this form; and it is allowed in executing deeds, and in subscribing the written instruments required by the Statute of Frauds. Other instances were cited by Mr. Taprell, where signatures, not in full, but in the forms habitually used by the parties, were allowed to be sufficient, under the Uniformity of Process Act, and under

*585] stat. 24 G. 2, *c. 44. In some cases the Legislature expressly requires both Christian and surnames to be written at full length; and, where that direction is for some reason introduced, it must be complied with. Here no such direction is given, either expressly, or by reference to any form as a model. It is admitted that a contraction of the name would be sufficient: what is an initial but a contraction, though less distinct than other contractions sometimes are? *Regina v. Hartlepool*, 2 Lowndes, M. & P. 666, is applicable, and goes the full length required in this case. There the notice of claim was to be made according to a model form which gave the Christian names in full: yet my brother Erle held that a notice signed "A. W. Dobing" was sufficient. And by the rule, as we lay it down, all the objects of the Legislature are gained, and the election may be carried on with simplicity and propriety. Any two burgesses may require the questions to be put according to sect. 84: "Are you the person whose name is signed to the voting paper?" and "Are you the person whose name appears as A. B. on the burgess roll," "being registered therein as rated for" such and such property? and a person answering falsely would be punishable. To insist upon Christian names being given in full might often introduce confusion, and disfranchise many voters. The rule we lay down creates no difficulty. There is no occasion for referring to the interpretation clause, sect. 142, because there is not here any misnomer or misdescription: the paper is "signed with the name" according to the usual acceptation of those words.

COLERIDGE, J.—The question, whether or not a paper is signed by *586] such a man, is different from the question *abstractedly put, what the man's name is. At Eton, when I was asked, *Quid tibi nomen et cognomen?* I was bound to give all my names: but the statute, in this clause, does not make such an inquiry of the voter. It is providing for a particular mode of election through the agency of voters drawn from all classes of life, and who may or may not even be able to write. It requires the voter, therefore, merely to bring a paper with his "name" "signed on it." It does not, as my Lord has observed, even oblige him to write the name. In construing such an enactment, to insist that both the voter's names should be written at length would be adopting a construction against the franchise, which would be contrary to a universal rule. We need not call to aid sect. 142, except as showing the intention of the Legislature to favour the franchise: in this respect the provision, that misnomer or misdescription shall not prejudice, gives the key to other enactments. Using it so, if we are asked what is meant by "signed with the name" in sect. 82, we may well answer that, if writing the surname with an initial before it is a signing in popular acceptation, that is sufficient.

ERLE, J.—It is a proper general rule, in considering the exercise of rights under this statute, to inquire whether, according to common

understanding, the party has expressed an intention to exercise them. And I think that, where a man's surname and the initial of his Christian name are signed upon a voting paper, it is, in common understanding, signed with his name. It is unnecessary, therefore, to say anything as to sect. 142.

CROMPTON, J.—We must construe sect. 32 according *to com- [*587
mon parlance. When signing is spoken of, the ordinary under-
standing is that the signature should be in the form in which a man
usually writes his name. This act itself shows that where more par-
ticularity is wanted the Legislature uses words requiring it.

Crowder then proceeded to answer the second class of objections, but
was stopped by the Court.

Slade, *contra*, contended that the descriptions of residence in the
voting papers were bad, because the statements differed from those on
the burgess roll. [Lord CAMPBELL, C. J.—It is immaterial how the
place of abode is stated on the roll: sect. 32 requires only the name of
the street, &c., where the property for which the burgess appears to be
rated on the burgess roll “is situated.”] Slade then read the words
of the second question to be put to the voter under sect. 34. [COL-
LIDGE, J.—That merely prescribes the question to be put as to the voter's
identity with the person described on the burgess roll. Lord CAMP-
BELL, C. J.—Clearly all that is required by sect. 32 is the name of the
street or place in which the property is: and, according to the evidence
here, that requisition has been complied with literally and rigorously.]

The Court having decided against the relator on this objection, no
other point was argued. Rule discharged.

*HOWES v. BARBER.

[*588

If a party to a cause be examined on his own behalf under stat. 14 & 15 Vict. c. 99, s. 2, the
Master may allow, in taxation, for his maintenance during the time of his detention for the
purpose of giving evidence, as in the case of any witness, if his testimony, in the Master's
opinion, was material and necessary, and if he attended for the purpose of being examined as
a witness and not merely to superintend the cause.

A RULE nisi was obtained in the last Term for a review of the
Master's taxation in this case.

The action was brought to recover wages due to the plaintiff as
master, from the defendant as owner, of a ship, for bringing her home
from Valparaiso. The writ was issued September 29th, 1851; and the
plaintiff remained in England, unemployed, and solely for the purpose
of giving evidence in the cause, from that time till January, 1852, when
the cause was tried. On November 8th the defendant obtained an
order for a month's time to plead; and it was a term of the order that
the parties should be at liberty to examine any witnesses before issue
joined. The plaintiff was examined as a witness on the trial; and a

verdict was found for him. He was, as appeared on affidavit before the Master, a material and necessary witness. On taxation, the plaintiff claimed costs, as a witness for his detention. The allowance was resisted on several grounds, and, among them (as appeared by affidavit in support of the present rule), "that a plaintiff cannot be allowed for his loss of time, but for his necessary expenses in attending the trial, only;" and that the plaintiff might have avoided a detention by tendering himself to be examined under the order. The master, after calling for special affidavits of increase, allowed as follows: "To the plaintiff for his detention from the 18th day of September, 1851, to the 18th day of January, 1852, four months, 10*l.* per month. Forty *589] pounds." (a) Application was *made to Crompton, J., at Chambers for an order to review; and the learned Judge referred the matter to the full Court. In the same term, (b)

Lush showed cause.—A party to a cause, being now competent to give evidence on his own behalf, is entitled to compensation for his attendance like other witnesses. The Master has decided here that the plaintiff's evidence was material. [Lord CAMPBELL, C. J.—Suppose it was material but not indispensable.] Still he would be entitled. It is well known that, since the Act 14 & 15 Vict. c. 90, enabling parties to give evidence for themselves, a party is discredited with the jury if, knowing anything of the facts, he does not personally appear. In the county Courts, allowance for time is made to parties, as to other witnesses. It is contended on the other side that the plaintiff might have offered himself as a witness under the order of November 8th. But this was a point entirely for the consideration of the Master; and his exercise of discretion upon it is decisive. In *M'Alpine v. Poles*, 1 Cro. & M. 795,† S. C. 3 Tyr. 871, the Master allowed the plaintiff for witnesses brought from abroad: it was urged that they might have been examined on interrogatories under stat. 1 W. 4, c. 22: but Lord Lyndhurst, C. B., said: "It is frequently very desirable that a party should be able to have his witnesses examined *vivâ voce*. It appears to us that the allowance of such witnesses is still a matter in the discretion of the Master, in each particular instance, just as it was before the late Act." And, after conference with the Judges of the other Courts, he said: *590] "They agree with us in the opinion, which we have formed, that the Act of Parliament makes no difference in this respect. We think that the matter is in the discretion of the Master, subject to be reviewed by the Court; and we think, that, in this particular instance, the discretion was properly exercised."

Unthank, contra.—The result of this case will be important, as, if

(a) The Master (Turner) informed the Court that he made the allowance not for loss of time but as subsistence money according to the plaintiff's condition in life, as master of a merchant vessel trading to foreign countries. See *Mount v. Larkins*, 8 Bing. 196 (E. C. L. R. vol. 21).

(b) May 8th. Before Lord Campbell, C. J., Keble, and Crompton, J.

the plaintiff establishes his right to costs, no one will ever advise a party to be absent from a trial where he might give evidence to confirm that of other witnesses. Undoubtedly costs are to be assessed according to the discretion of the Court; this is the effect of the statute of Gloucester, 1 stat. 6 Ed. 1, c. 1, s. 2, as to plaintiff's costs; and in stat. 28 H. 8, c. 15, s. 1, giving costs to defendants, "the discretion of the Judge or Judges" is expressly referred to. But the Courts do not, in the exercise of that discretion, award costs to a party simply for attending to his own business; for doing on his own behalf what is the business of an attorney. His attendance at consultation may be more important than his presence as a witness in Court; yet no allowance has ever been claimed for such attendance. Now in this case nothing appears which can enable the Court to say that the plaintiff did not remain in England, and attend the trial, as a party managing his own cause. As to the materiality of the testimony, it must be admitted that the Master's judgment must decide.

Cur. adv. vult.

Lord CAMPBELL, C. J., in this term (June 2d), delivered the judgment of the Court.

*We are of opinion that the Master's taxation of costs in this case was proper. No doubt, the practice of allowing costs to the successful party in respect of his having been a witness for himself may lead to inconvenient consequences; but we do not think we can lay down a rule that such costs can never be allowed. The party is now by law admitted as a witness; he may be a material and necessary witness; and his attendance may not only obtain justice for himself, but may lessen the expense which would otherwise fall upon the opposite party, by obviating the necessity for requiring the attendance of other witnesses, or for issuing a commission to examine witnesses abroad.

The reasonable expenses to which the plaintiff is put by being obliged to attend and be examined as a witness to enforce payment of a just demand, or to seek redress for an injury, should be thrown on the wrongdoer. Again, if an unfounded action is brought, and the evidence of the party improperly sued is necessary for his defence, he is not indemnified if his own expenses as a witness are not allowed to him.

Here the plaintiff, the captain of a ship, had a demand against the owner for wages; and this he could make out only by his own evidence, or by sending out a commission to a distant country. Remaining in England for the purpose of being examined at the trial, the Master has made him the like allowance for maintenance from the service of the writ till the day of trial which would have been made to a third person as a witness under similar circumstances. *Berry v. Pratt*, 1 B. & C. 276 (E. C. L. R. vol. 8), and other decisions show that to a third person

*592] so remaining in *this country as a witness such an allowance would be proper: and, the Legislature having been pleased to permit the parties to be examined in their own behalf, we cannot say that the expense of the successful party who has been so necessarily examined should not fall upon the party who, resisting a legal demand, or making an unlawful one, has caused this necessity. In the somewhat analogous case of an indictment removed by certiorari where the defendant is liable to costs, if the prosecutor be a material witness and has been examined, it has been usual to allow his expenses, though not to make him any compensation for loss of time.

We must trust to the intelligence and the vigilance of the taxing officers to detect and to frustrate attempts that may be made to swell costs unnecessarily under the pretext that the parties were material and necessary witnesses. The simple fact of their being examined as witnesses must by no means be considered sufficient to establish a claim for their expenses as witnesses; and, if it appears that their attendance was unnecessary, or that they attended to superintend the conduct of the cause, the claim ought to be rejected.

In the present case the plaintiff seems to have acted with perfect good faith, and to have been necessarily detained in England that he might be a witness. Therefore this rule that the Master should review his taxation must be discharged.

Rule discharged.(a)

(a) See *Dowdell v. Australian Royal Mail Company*, 3 H. & B. 902 (H. C. L. R. vol. 17).

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*AMOTT v. HOLDEN. June 12.

Declaration, on the obligatory part only, upon two bonds, dated in 1828 and 1829 respectively. Pleas: 3. That the alleged causes of action did not accrue within twenty years. 4. That after the making of the bonds, and before the commencement of the action, defendant became bankrupt, and that the said causes of action accrued before such bankruptcy. Replication, joint issue on the fourth plea, and, to the third plea, that the said causes of action did accrue within twenty years. Issue thereon.

The plaintiff then (by enrolment on the record) set out the bonds and the conditions. The first bond stated that J. Mather and defendant bound themselves, and each of them, by himself, his heirs, &c., to the plaintiff in the sum of 300*l*. The condition (after reciting that the said J. M. had agreed with plaintiff for the sale to him for 150*l*. of an annuity of 20*l*. to be paid to plaintiff, his executors, &c., during the joint and several lives of plaintiff and his wife, and the survivor; that J. M. had requested defendant to join in and execute the bond, which he had agreed to do, for securing the regular payment of the annuity; and that the 150*l*. had been paid to J. M.) was for payment of the annuity, by J. M. or defendant, or their or either of their heirs, &c., some or one of them, by equal half-yearly payments, on, &c., during the joint and several lives of plaintiff and his wife, and of the survivor, and a proportionate part in case of the survivor dying between the days of payment. The second bond and condition were similarly framed for the payment, by and to the same parties, of an annuity of 10*l*. The plaintiff then suggested that, in 1861, two and a half years' arrears were due in respect of such annuity, and were still unpaid.

At the trial, it appeared that the defendant had become bankrupt in 1836; that J. M. had paid the annuities half-yearly down to 1848, but never till after the day of payment fixed by the condition, so that there had been breaches of the condition twenty years before action, and

before the bankruptcy : and that the arrears suggested by plaintiff were still due. Plaintiff had not attempted to prove as annuity creditor under defendant's bankruptcy.

Held, that a new cause of action arose upon each successive breach of the condition ; that, on the record as it stood, plaintiff was entitled to prove, at the trial, breaches within twenty years ; and that, on such proof, he was entitled to a verdict upon the issue on the Statute of Limitations.

Held, further, by Lord Campbell, C. J., and Erie, J., dissentiente Wightman, J., that defendant's liability under the bonds and conditions was that of a surety only ; that J. M. was the principal, and grantor of the annuity : that plaintiff, therefore, could not have proved, under defendant's bankruptcy, in respect either of the penalties or of the breaches of condition committed before the bankruptcy ; and that consequently the matter pleaded and proved was no bar to the action.

DEBT on bond. (Action commenced 24th June, 1851.) The first count stated that defendant, on 9th June, 1828, by his writing obligatory sealed with his seal (profert), acknowledged himself to be held and firmly bound to the plaintiff in 300*l.* : The second count alleged that defendant, on 2d June, 1829, by his certain other writing obligatory, &c. (profert), acknowledged himself to be held, &c., to the plaintiff in the *sum of 150*l.* : Yet defendant had not paid the said 450*l.*, though [*594 often requested.

Third plea : That the causes of action in the declaration mentioned did not, nor did any or either of them, accrue to plaintiff within twenty years next before the commencement of this suit.

Fourth plea : That, after the making of the said several writings obligatory, and before the commencement of this suit, viz. on 3d September, 1836, defendant became a bankrupt within the true intent and meaning of the statutes, &c. ; and that the causes of action in the declaration mentioned, and each of them, accrued to plaintiff before defendant became a bankrupt.

Replication, joining issue on the fourth plea : and, to the third plea : That the said causes of action did accrue within twenty years, &c. Issue thereon. The plaintiff then set out (by enrolment on the record) the bond in the first count and its condition as follows :

Know all men, &c., that we, John Mather, of, &c., and John Holden, of, &c., are held and firmly bound to George Amott, of, &c., in the sum of 300*l.*, of lawful money, &c., to be paid to the said George Amott or his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves and each of us, by himself, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed, &c. Dated 9th June, A. D. 1828.

Whereas the above bounden J. M. hath agreed with the above-mentioned G. A. for the sale to him, the said G. A., of one annuity or clear yearly sum of 20*l.* to be paid to the said G. A., his executors, administrators, or assigns, during the joint and several lives and life of the said G. A. and M. H. A. his wife, *and during the life of the survivor of them, at or for the price or sum of 150*l.* ; and the said J. M. hath requested the said J. Holden to join in and execute the above-written bond or obligation, which the said J. Holden hath con- [*595

sented and agreed to do, for securing of the due and regular payment of the said annuity: and whereas the said G. A. hath duly paid to the said J. M. the said sum of 150*l.*, in good and lawful money of Great Britain, in full, for the purchase of the said annuity or yearly sum of 20*l.*, which he the said J. M. doth hereby admit and acknowledge. Now the condition of the above-written obligation is such that, if either the said J. M. or the said J. Holden, or their or either of their heirs, executors, or administrators, some or one of them, do and shall well and truly pay or cause to be paid unto the said G. A., his executors, administrators, or assigns, or as he or his executors, administrators, or assigns shall direct or appoint, during the natural and several lives and life of the said G. A. and M. H. A. his wife, and during the life of the survivor of them, one annuity or clear yearly sum of 20*l.*, of lawful money current in Great Britain, by two even and equal half-yearly payments, on the 9th day of December and the 9th day of June in every year, without any deduction or abatement whatsoever; and if the said G. A. and M. H. A., or whichever of the two shall or may survive the other, and (a) shall afterwards depart this life between any of the half-yearly days whereon the said annuity is made payable, then if either the said J. M. or the said J. Holden, or their or either of their heirs, executors, *596] administrators, or assigns, some or one of them, do and *shall well and truly pay unto the executors or administrators of the said G. A., or the person legally authorized to receive the same, a proportionate part of such annuity or yearly sum of 20*l.*, according to the time which the survivor of them, the said G. A. and M. H. A. his wife, may happen to live after the then last yearly payment shall have become due, without any deduction or abatement, then the above-written bond or obligation shall be void, otherwise the same shall remain in full force and effect."

The plaintiff then suggested that, on 9th June, 1851, 50*l.*, being the arrears of the said annuity from 9th December, 1848, was due to the plaintiff, and that neither the said J. M. nor the defendant would pay the same.

The record then set out the bond in the second count, and its condition, which were similar to those in the first, except that the penalty was 150*l.*, and the annuity was 10*l.*, to be paid half-yearly, on 22d December and 22d June.

The plaintiff then suggested that, on 22d June, 1851, 25*l.*, being the arrears of the last-mentioned annuity from 22d December, 1848, was due to the plaintiff, and that neither the said J. M. nor the defendant would pay the same.

On the trial, before Lord Campbell, C. J., at the London sittings after last Hilary Term, it appeared that the defendant had become bankrupt in 1836; that Mather had, from time to time, made the half-

(a) *Sic.* Apparently the "and" should be omitted.

yearly payments of the annuities to the plaintiff down to 1848, but that none of those payments had been made till after the day appointed in the condition, so that several breaches of the condition had, in fact, taken place more *than twenty years before the action, and [*597 before the defendant's bankruptcy. The plaintiff had not attempted to prove any claim against the defendant, in respect of the annuities, under the commission of bankruptcy. The arrears suggested by the plaintiff were proved to be still due. A verdict was found for the plaintiff, leave being reserved to move to enter a verdict for the defendant on the third and fourth pleas. *Knowles*, in last Easter Term, obtained a rule nisi accordingly. In this Term, (a)

Montagu Chambers, Bramwell, and Thompson Chitty, showed cause. (a)—First, as to the plea of bankruptcy. The plaintiff's claim against the defendant is not one which was capable of proof in the Bankruptcy Court; and therefore the defendant's bankruptcy and certificate are no bar to the action. In both bonds Mather is the principal, and the defendant is only a surety; and the annuity, under either bond, is payable during the lives of the plaintiff and his wife, and the life of the survivor: many contingencies, therefore, must have occurred before the defendant's liability under the bonds assumed the shape of a definite claim against him by the plaintiff, so as to be capable of valuation and proof according to the Bankruptcy law. [Lord CAMPBELL, C. J.—The plaintiff's claim against Mather, under the bonds, also depended upon certain contingencies.] That is so; but his claim against the defendant was subject to an additional contingency, that of default by the principal. Until that was clearly shown, the plaintiff would [*598 *have no claim against the defendant; and the Commissioner in Bankruptcy had no power to order inquiries to be made as to that. *Thompson v. Thompson*, 2 New Ca. 168 (E. C. L. R. vol. 29), is directly in point. The *Overseers of St. Martin v. Warren*, 1 B. & Ald. 491, and *Goddard v. Vanderheyden*, 3 Wils. 262, are also authorities in favour of the plaintiff. [Lord CAMPBELL, C. J.—May not Mather and the defendant be considered as joint grantors of the annuity?] Even on that supposition the Court of Bankruptcy would probably not allow the plaintiff to prove a claim against one only. [WIGHTMAN, J.—I think it would, if Mather and the defendant had granted jointly and severally.] The bonds here do not constitute the grant of the annuity: they recite the grant; but they operate only as a collateral security for payment, Mather being the principal in that security, and the defendant his surety. WIGHTMAN, J.—Either is surety for the other. According to your argument the plaintiff could not prove his claim upon the bonds against Mather.] Not upon the bonds; but he could, under stat. 6 G. 4, c. 16, s. 54, prove against him as grantor of the annuity. It will probably

(a) June 12th. Before Lord Campbell, C. J., Wightman and Erle, Js. Crompton J., having been counsel in the cause, took no part in the discussion.

be contended that, even if the plaintiff could not have proved a debt from the defendant in respect of the annuity, yet he might have proved a debt against him in respect of the penalty in the bond, which had been forfeited before the bankruptcy. But it is not always true that a claim in respect of a penalty on a bond forfeited before the bankruptcy of the obligor can be proved against him under the commission. It can be proved only where the payment or other benefit to the obligee which *599] is secured to him by the obligor is *capable of valuation; *Young v. Taylor*, 8 Taunt. 815 (E. C. L. R. vol. 4). (a) In the present case, the defendant being bound to pay only after total default by the principal, the plaintiff had no claim against the defendant, at the time of the bankruptcy, which was capable of valuation. The decision in *Perkins v. Kempland*, 2 W. Bl. 1106, which will probably be relied on by the other side, is explainable on this principle; for there it appeared that the defendant, the obligor, had executed the annuity bond, not as a surety, but as a principal; so that the nature and amount of the plaintiff's claim against him became definite and calculable immediately upon forfeiture of the bond. *The Skinners' Company v. Jones*, 3 New Ca. 481 (E. C. L. R. vol. 32), will also be relied on. But in that case there was no grant of an annuity independent of the condition of the bond; and the payment secured was payment of a sum certain, and not, as in the present case, payment of an amount depending upon the duration of a life.

Next, as to the Statute of Limitations. There was, no doubt, a breach of the condition more than twenty years before the action; but that is not the breach upon which the plaintiff seeks to recover. He might waive the first and other subsequent breaches, and declare for breaches committed within twenty years; *Sanders v. Coward*, 15 M. & W. 48, 56:† and, having declared generally upon the bond, and having, in his replication to the plea of the Statute of Limitations, suggested breaches committed within twenty years, and having given evidence of those breaches at the trial, he must be considered to have declared upon those breaches; *Tuckey v. Hawkins*, 4 Com. B. 655 (E. C. L. R. vol. *600] 56). *[WIGHTMAN, J.—The obligee must be taken to have waived the previous breaches by accepting subsequent payments.] He has chosen not to avail himself of the penalty of the bond in respect of any previous defaults in payment; and therefore the condition of the bond is still in force as regards the non-payments in respect of which he claims; *Blair v. Ormond*, 17 Q. B. 423 (E. C. L. R. vol. 79).

Knowles, J. Henderson, and Milward, *contra*.—First, the question as to the Statute of Limitations depends, not upon the general law of pleading on this point, but upon the particular form of the record in the present case. In *Sanders v. Coward* and *Blair v. Ormond* the condition of the bond appeared on the pleadings before the plea of the

(a) *Taylor v. Young* (Judgment affirmed on Error), 3 B. & Ald. 521 (E. C. L. R. vol. 5).

Statute of Limitations was pleaded. In the present case that plea is directed against the obligatory part of the bond only, and is clearly a good plea as to that, the breach having occurred more than twenty years ago. The plea states that the causes of action in the *declaration* mentioned occurred more than twenty years ago; and the replication states that they did not. Upon this issue the defendant is entitled to a verdict. *Tuckey v. Hawkins* is distinguishable. In that case there was only one breach of the condition which the plaintiff could declare upon, and that breach was within twenty years of the action. Here there are several breaches, and a forfeiture, more than twenty years ago, which would satisfy the declaration. The declaration is, therefore, *prima facie*, upon one of these; and the plaintiff, if he intended to rely on later breaches, ought to have new assigned.

*Next, as to the plea of bankruptcy. It is no doubt true [*601 that a claim in respect of a debt payable upon a contingency cannot always be proved under the commission: but the claim here does admit of proof. A debt is not necessarily incapable of valuation because it arises upon a contingency which has not yet happened. In *The Overseers of St. Martin v. Warren*, 1 B. & Ald. 491, the claim, as Lord Ellenborough observed, was both contingent and, from its nature, incapable of valuation; but he mentions the very case of an annuity as a claim which, although contingent, was recognised by the Courts as admitting of proof. In *Young v. Taylor*, 8 Taunt. 315 (E. C. L. R. vol. 4), (a) the claim was for unliquidated damages, and not for a sum certain. In *In re Willis*, 4 Exch. 530, †(b) it was held that a guarantee for a sum certain, even though the claim did not arise till after the bankruptcy of the guarantisor, was provable. But in fact the defendant here is as much a principal in the bonds as Mather; and the plaintiff might proceed against either without noticing the other. If these had been only covenants, instead of bonds with a condition, the defendant would be equally liable with Mather in an action of debt; *Addison v. Gibson*, 10 Q. B. 106 (E. C. L. R. vol. 59), *Caldwell v. Becke*, 2 Exch. 318.† [Lord CAMPBELL, C. J.—The plaintiff might proceed against either the defendant or Mather in an action: but it does not follow that he could prove against either under a commission of bankruptcy.] He could prove against either, if both are principals. If Mather had become bankrupt, the plaintiff clearly could have proceeded against him under the bond: *and the bond puts both Mather [*602 and the defendant in the same position. [Lord CAMPBELL, C. J.—In the recitals, the defendant appears to be in the position of a surety.] The condition cannot be controlled by the recitals: and in the condition both are made equally liable. But, even assuming the defendant to be a surety only, the plaintiff could have proved against

(a) *Taylor v. Young* (Judgment affirmed on Error), 3 B. & Ald. 521 (E. C. L. R. vol. 5).

(b) See *Thompson v. Whitley*, 16 Q. B. 189 (E. C. L. R. vol. 71).

him. It has been argued that, in order to enable the creditor to prove against the surety, it would be necessary to show that the principal could not pay; and that the Commissioners would not allow a proof dependent upon such showing, and have no discretion to order inquiry to be made to that effect. But that is not so; where the rights of creditors are in question, the Commissioners would order such inquiries, and allow proof against the surety if it appeared that the principal was not solvent. [Lord CAMPBELL, C. J.—You are arguing against *Thompson v. Thompson*, 2 New Ca. 168 (E. C. L. R. vol. 29). The claim against the surety there was as capable of valuation as the claim against the defendant here; but the Court held that the Commissioner was right in not allowing it to be proved.] The defendant's engagement there was purely collateral, and his liability would not be contemporaneous with that of the principal, as the present defendant's would be with that of Mather. In *Thompson v. Thompson*, if the surety had paid before the principal had made default, he would have paid what he never owed; that would not be so here. In *Thompson v. Thompson*, moreover, the debt accrued after the bankruptcy; in the present case default had been made by Mather before the bankruptcy; and a debt *603] accrued upon the default of *either Mather or Holden, and one which there was no difficulty in valuing.

Further, the penalty of the bond became an absolute debt upon the forfeiture of the bond caused by the first breach, which took place before the bankruptcy. The claim in respect of that penalty was clearly capable of proof: and the annuity itself might, for the purposes of such proof, be valued. *Perkins v. Kempland*, 2 W. Bl. 1106, *The Skinners' Company v. Jones*, 8 New Ca. 481 (E. C. L. R. vol. 32), and *Wyllie v. Wilkes*, 2 Doug. 512, are in point. *Ex parte Granger*, 10 Ves. 349, is also in favour of the defendant, as far as it relates to proof under the bond; and the judgments in *Winter v. Mauseley*, 2 B. & Ald. 802, show that, where a bond is forfeited before the bankruptcy of the obligor, the obligee may prove upon it under a commission.

Lord CAMPBELL, C. J.—With respect to the question upon the Statute of Limitations, after hearing all that could be urged on either side, I entertain no doubt whatever. It is admitted that, since *Sanders v. Coward*, 15 M. & W. 48,† and *Blair v. Ormond*, 17 Q. B. 423 (E. C. L. R. vol. 79), where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture by reason of the non-performance of the first act in that series, yet, if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that. The obligee, therefore, is not prevented by the statute from suing in respect *604] of breaches committed more than twenty years after the *first breach, if he has chosen to waive the previous breaches. If the statute could have that effect, the obligor of an annuity bond would be

discharged after he had paid the annuity for twenty years, if he had paid it a day too late on each occasion. Reliance is placed on the form of the record: and it is contended that, as it is here drawn up, the plaintiff cannot avail himself of breaches committed more than twenty years after the first breach. I do not, however, think that the record, as it stands, is any bar to such a course. The declaration is upon the bond, simply, and goes for the penalty. The plea states that the causes of action in the declaration mentioned did not arise within twenty years before the suit. The replication says that they did. The onus of proof lies upon the plaintiff: and he then brings forward the condition of the bond, as evidence of the nature of the contract, secured by that bond, between the plaintiff and the defendant, and shows breaches of that contract within twenty years. We must therefore consider those breaches to be the causes of action mentioned in the declaration. It was contended, however, that, inasmuch as a previous breach, more than twenty years back, had been proved, that breach must be assumed to be the cause of action declared upon. I think that is not so; and therefore that it was not necessary for the plaintiff to re-assign. *Tuckey v. Hawkins*, 4 Com. B. 655 (E. C. L. R. vol. 56), is a direct authority upon this point. It was argued that in that case there was only one breach. That fact, however, did not enter into the grounds of the decision. The question raised was, whether the plaintiff, having declared upon the bond alone, could, upon the Statute of Limitations being pleaded, avail himself of the condition to show breaches within twenty years: [*605 and the Court held that he could. I cannot see any substantial distinction between that part of the case and the present. The plea of the Statute of Limitations, therefore, is no bar to the present action. With respect to the point arising upon the plea of bankruptcy, the Court will take time to consider its judgment.

WIGHTMAN, J.—The condition of the bond appears on the record; and, for the defendant to succeed upon the plea of the Statute of Limitations, it must have been shown, according to *Sanders v. Coward*, 15 M. & W. 48,† that no breach of that condition took place within twenty years; inasmuch as every breach creates a fresh cause of action. The evidence brought forward at the trial explained what were the causes of action upon which the plaintiff declared, and showed that they did accrue within twenty years. The defendant, therefore, failed upon this issue.

ERLE, J.—*Sanders v. Coward* shows that the plaintiff here was at liberty to waive the breaches committed twenty years ago, and rely upon subsequent breaches committed within that period: and I agree with the rest of the Court that the form of the pleadings here does not prevent the plaintiff from taking that course. *Cur. adv. vult.*

Their Lordships, in this term (June 12th), not agreeing in opinion, delivered their judgments seriatim.

*606] ***ERLE, J.**—In this case the question is raised, whether the grantee of an annuity secured by the joint and several bond of the grantor and a surety can, under the bankruptcy of the surety, prove for the value of the annuity. In 1828 an annuity of 20*l.*, payable half-yearly, was granted by Mather. The defendant, Holden, joined him in a bond, which, reciting this grant and his consent to be surety, was conditioned to be void if either grantor or surety should pay at the proper days. The annuity was paid by Mather half-yearly, but never at the proper day; so that the bond had become forfeited before the bankruptcy.

Holden became bankrupt in 1836. It is not stated, nor is it material to inquire, whether there was an arrear at the time of the bankruptcy; because the annuity was afterwards paid from time to time by Mather down to 1848. The present action is brought for the arrear left unpaid after that time.

The law is clear, that the liability of the surety for the grantor of an annuity is not a debt payable upon a contingency, provable under the bankruptcy of the surety by virtue of sect. 164 of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. *Ex parte Thompson*, 2 Deacon & Chitty, 126, and *Thompson v. Thompson*, 2 New Ca. 168 (E. C. L. R. vol. 29), are express on the point; the impossibility of calculating the solvency of grantors of annuities being there relied upon. I would also refer to the elaborate and able judgments of Messrs. Merivale, Fonblanque, and Holroyd upon the question of proving upon an indemnity bond, in *Ex parte Marshall*, 1 Mont. & Ayr. 118,^(a) in support of the same view. It is there shown that the power of proving for
*607] future *contingent debts is created by statute, and has been gradually introduced by successive provisions, which are now embodied in sects. 173—177 of the Bankrupt Law Consolidation Act. If the whole of these are taken together, it would appear that certain debts payable upon contingency are specifically provided for in the sections preceding the general enactment in sect. 177; and among those so specifically provided for are annuities, in respect of which, upon the bankruptcy of the grantor, proof must be made in the required form before resort can be had to the surety, whose liability is deferred; and, as no provision is made for proof on the bankruptcy of the surety, the grantor being solvent, it may be presumed, both from the silence of the Legislature and the nature of the liability, that no power for such proof was intended to be given.

But, although this might be true where the surety contracted expressly to pay on default of the grantor, the defendant contended that the form of the present bond created a simultaneous, instead of a successive, liability; and that the grantee might have treated either obligor, at his option, as the grantor, and so might have proved against the defendant,

(a) See *Ex parte Marshall*, Mont. & Bligh, 242.

Holden, as the grantor of the annuity. I am, however, of opinion that this ground cannot be maintained. The bond shows that the annuity had been already granted, and the relation of grantor and grantee created. The bond is an instrument beyond the grant, with the additional security of the defendant. The two are jointly bound; but the one is described as grantor, the other as surety. Whatever might be the effect of the present form of bond in respect of pleading, in bankruptcy, where the true substance is ascertained without pleading, the present form creates the same liability as the form in [*608 *Thompson v. Thompson*, 2 New Ca. 168 (E. C. L. R. vol. 29). If the grantor pays, the surety is free: if he makes default, the surety is liable. It would have been inconvenient to allow the plaintiff to prove against the surety, in 1836, the entire value of an annuity which has been paid by the principal for twelve years after, and may be paid in future by him; and the plaintiff could not have alleged with truth that the defendant had granted an annuity. Where the defendant was surety for the grantor, and had joined the grantor in a warrant of attorney to secure the annuity, on which judgment had been entered up before default, and afterwards the grantor made default, it was held that the grantee could not prove for the annuity under the bankruptcy of the surety, and, though there was a judgment to secure the annuity, the plaintiff was not an annuity creditor of the surety; *Johnson v. Compton*, 4 Sim. 87. So also, where the grantor and surety covenanted jointly and severally for the payment of the annuity, it was held that the grantee could not prove under the bankruptcy of the surety; the absolute covenant in one part of the deed was controlled by other parts showing that the covenantor stood in the relation of surety; *Ex parte Marks*, 3 Mont. & Ayrton, 521.

The defendant further contended that, as the bond had been forfeited by the omission to pay at the day, the penalty had become a legal debt, and so the plaintiff might have proved for the value of the annuity within the amount of the bond, according to *Ex parte Thistlewood*, [*609 19 Ves. 236, *Ferkins v. Kempland*, 2 W. Black. 1106, and other cases cited in *Ex parte Marks*, 3 Mont. & Ayr. 521: but, as is there observed by the Chief Judge,^(a) "These were all cases of bankrupt grantors; and there is no instance that I can find of the grantee having ever been admitted to prove the value of an annuity against the estate of a bankrupt's^(b) surety, even upon a bond forfeited."

I would further observe, that it would be contrary to the system of bankruptcy to allow proof for the penalty in all cases of bonds for the performance of promises when there has been a nominal breach but nothing due, and to make the assignees liable indefinitely to a claim for a dividend in case of a future breach. It would have been unjust to the creditors of Holden, in 1836, to have retained a dividend for the

(a) P. 533.

(b) Sic. Probably a misprint for "bankrupt."

penalty of the bond, out of which a dividend from time to time might be paid proportionate to an instalment, or part of an instalment, left in arrear by Mather; and inconvenient to the assignees to require the accounts to be unsettled during the lives for which the annuity was granted. I am thus of opinion that the plaintiff could not have proved for the penalty of the bond under the bankruptcy of Holden, so that the defence under the plea of bankruptcy fails.

WIGHTMAN, J.—I feel great distrust in the opinion I have formed in this case, in consequence of its differing from those of my Lord Chief Justice and my brother Erle; but, such as it is, I have not formed it without deliberate consideration.

*610] This was an action of debt on a joint and several bond *by the defendant and one Mather to the plaintiff. The declaration stated the obligatory part of the bond merely, and did not show the condition. The defendant pleaded a plea of bankruptcy, which was found against him; and the question is, whether, at the time of the bankruptcy, the obligee of the bond could be admitted a creditor, and had a provable debt under the commission as an annuity creditor, under sect. 54 of stat. 6 G. 4, c. 16, the statute in force at the time of the bankruptcy.

The condition of the bond recited that Mather had agreed with the plaintiff for the sale to him of an annuity of 20*l.*, for the joint and several lives of himself and his wife, and the survivor, for the sum of 150*l.*, and that Mather had requested the defendant to join in and execute the bond, which he had consented to do, for securing the due and regular payment of the annuity; and that Amott had paid the 150*l.* purchase-money to Mather. It was then conditioned for the bond being void if either Mather or the defendant paid the annuity half-yearly, at specified days. It does not appear that there was any other grant of, or security for, the annuity than the bond, which appears to have been executed in the year 1828.

The defendant became bankrupt in 1836: and at that time the bond had been forfeited by omission to pay the annuity exactly at the specified days; but there were very trifling, or no, arrears: and it appears that the annuity was paid by Mather down to the year 1848: and no attempt was made by the plaintiff to be admitted to prove under the commission against the defendant as an annuity creditor under stat. 6 G. 4, c. 16, s. 54.

It was contended, for the plaintiff, that the defendant's bankruptcy *611] and certificate were no bar to the action, as *he could not have come in as an annuity creditor under the commission, the defendant being a surety merely; and several cases were cited in which it has been decided that the contingent liability of a surety could not be the subject of proof under a commission against him. This was hardly disputed; but it was alleged, on the other side, that the defendant was

not a surety, but a principal; that his liability was not collateral, but direct; and that the grantee of the annuity had precisely the same legal rights against him upon the bond as he had against Mather. In the cases of *Thompson v. Thompson*, 2 New Ca. 168 (E. C. L. R. vol. 29), *Ex parte Thompson*, 2 Deacon & Chitty, 126, and *Johnson v. Compton*, 4 Sim. 87, the bankrupts were all sureties in the strict legal sense, liable only *collaterally*, by the terms of the instruments by which they were bound, and upon default made by their principals, and not until then; and it was said that those cases were, upon that ground, clearly distinguishable from the present. The question then is, whether the defendant is, in contemplation of law, a principal or a surety: if he is a principal, the grantee of the annuity might have come in as an annuity creditor under the commission against Holden, as he might if the commission had been against Mather, who is admitted to be a principal.

There is no other grant of the annuity, or security for its payment, than the bond itself. The recitals show that Mather had agreed to grant the annuity, and had received the consideration-money, and had requested Holden to join him in the bond for securing the payment of the annuity, which he accordingly does, in terms which make him as much a principal, and bind him *as directly, as they do Mather. [*612 If the bond is the instrument by which the annuity is granted (and there is no other), Holden is as much a grantor as Mather, and as directly liable to pay it, though the original agreement to grant it was by Mather only, and he only had the benefit of the consideration. The bond is by both Mather and Holden, conditioned to be void if either of them shall pay the annuity at the specified times. In *Guy v. Newsom*, 2 Cr. & M. 140, † S. C., 4 Tyr. 31, it was held that a covenant by the defendant and two others that they, or some or one of them, would pay a sum of money to the plaintiff by instalments at future days, was an absolute, and not a collateral, covenant by the defendant, though it appeared that the defendant had no interest in the consideration, and entered into the covenant for the benefit of others of the covenantors, and to secure payment of money owing from them; and a discharge of the defendant under the Insolvent Debtors' Act, 7 G. 4, c. 57, s. 46, was a bar to the action; which it would not have been, had he been a surety only.

In *Baxter v. Nichols*, 4 Taunt. 90, the bankruptcy and certificate of one of several joint covenantors for payment of an annuity was held to discharge him, though it appeared that he was only a surety; the covenant for payment being absolute, and not collateral. The authority of this case is recognised by the Courts in the cases of *Brown v. Lee*, 6 B. & C. 689 (E. C. L. R. vol. 18), and *Ex parte Marks*, 3 Mont. & Ayr. 521; but it is distinguished from them.

In the present case, the defendant was, in one sense, a surety, as he

*613] entered into the bond at the request of *Mather, to secure jointly with him the payment of an annuity which Mather had agreed to grant, and for which he alone received the purchase-money; but, in law, the defendant bound himself absolutely, and not collaterally; and he is, as it seems to me, upon the authority of the cases to which I have referred, a principal as between him and the grantee of the annuity.

One of the leading cases upon the point, and, in many of its circumstances, nearly resembling the present, is that of *Ex parte Marks*, 3 Mont. & Ayr. 521. It appeared, in that case, that by an indenture, reciting that one Coindet had agreed with one Galloway for the sale to him of an annuity of 100*l.*, it was witnessed that, in consideration of 1000*l.* paid to Coindet, he (Coindet) granted an annuity of 100*l.* a year to Galloway; and Coindet and one Colnaghi jointly and severally covenanted with Galloway that they, or one of them, would pay the annuity at the times specified in the deed. If the deed had stopped there, and there had been no qualification of the covenant, the case, upon the bankruptcy of Colnaghi, would exactly have resembled the present; and it would appear, from the judgment of the Court, that the grantee of the annuity would have been entitled to prove as an annuity creditor, under sect. 54 of stat. 6 G. 4, c. 16, against the estate of Colnaghi, though the latter only entered into the covenant to secure the payment, without any benefit to himself. The deed, however, contained a proviso at the end of the covenant that, in case Coindet made default in payment of the annuity, Galloway would give notice in writing, and *614] demand payment of Colnaghi, twenty-one days before adopting any measure to compel performance of the covenant by Colnaghi. The Court held that this proviso controlled and limited the covenant, and made it conditional and collateral instead of absolute, converting it, in effect, into the covenant of a surety only; and, upon that ground, decided that the grantee of the annuity was not entitled to prove under the commission against Colnaghi.

The case *Ex parte Marshall*, 1 Mont. & Ayr. 118,^(a) does not apply to the present, as the bond in that case was not forfeited at the time of the bankruptcy, and therefore could not be proved, being for indemnity merely.

I have been wholly unable to discover any case in which such an obligation as that into which the present defendant entered has been held to be that of a surety. In terms it is that of a principal binding himself to the performance of an act by himself or Mather, though originating in a request from Mather, and to secure a payment originally contracted for by him. In all the cases cited for the plaintiff the bankrupt was a surety in the legal sense, and collaterally liable only; and those cases, therefore, are clearly distinguishable from this. In

(a) See *Ex parte Marshall*, Mont. & Bligh, 242.

point of law, Holden was as directly liable as Mather: and, if the grantee would be an annuity creditor, by virtue of the bond which had been forfeited, under a commission against Mather, I think he would be entitled to come in as an annuity creditor under the commission against Holden, and that his certificate is a bar. I may remark that, if Mather had become a bankrupt, Holden would not have been entitled to the benefit given to sureties for payment of annuities by sect. 55 of the Act, which applies only to persons "who may be *collateral* *sureties for the payment of the annuity," which Holden is not, [*615 as he is not collaterally, but directly, liable. He is, therefore, not a surety within the meaning of the Act.

Other points were taken upon the argument of this case, particularly one upon a plea of the Statute of Limitations: but, as the Court entertained no doubt upon them, and, in effect, decided against the defendant upon those points at the time they were taken, it is unnecessary now to advert to them.

Lord CAMPBELL, C. J.—In this case I entirely agree with the opinion expressed by my brother Erle. Relying upon the reasons and authorities which he has adduced, I have very little to add. The defendant admits that the value of this annuity could not have been proved under his bankruptcy unless by virtue of some special enactment of the Legislature, and that sect. 54 of stat. 6 G. 4, c. 16, is the only one of which he can avail himself. It is further admitted that this does not apply to the case of a surety, and that if the defendant is to be regarded as a surety for Mather, he is still liable.

With the most sincere deference for the opinion of my brother Wightman, I have not been able to bring myself to entertain any doubt that, in this transaction, the defendant is to be regarded as a surety. A surety is a person who makes himself liable for the debt of another; and he is still a surety, although he may be called upon for payment at the same moment with the principal. If he has no interest in the transaction except as surety, and this is fully known to the creditor, who accepts him in the relation of surety, his contract with the creditor must be attended with all the incidents of *suretyship. Here it is [*616 stated in the condition of the bond that Mather was the sole grantor of the annuity, that Mather had received the 150*l.* for his own benefit, and that the defendant had been requested to join in the bond, which he had consented to do, for securing the due and regular payment of the annuity. I confess I cannot see how he was less a surety by the form of the condition, which says that the bond should be void if either Mather or the defendant paid the annuity half-yearly on the days specified. What would have been the effect if the language had been "if either the *grantor* or his *surety*" paid the annuity? After the recital that Mather was the grantor and Holden the surety, these two names indicated grantor and surety, and there is nothing to turn

the surety into a principal. If, upon the face of a written contract, two appear as joint debtors, and there is nothing to indicate that one of them is only a surety, the rights of the creditor cannot be affected by any part of the transaction between them to which he is a stranger; but the obligee of this bond knew well that the defendant was only a surety, that he had received no part of the consideration for the grant of the annuity, and that, if compelled to pay, although at the very day when the annuity became payable, he would have an action over against Mather, as the principal debtor, to recover the amount. If, upon the defendant's bankruptcy, Mather being still solvent, the grantee of the annuity had offered to prove it, would not the truth of the transaction have been taken from the recitals in the condition of the bond; and, as against Holden's creditors, had proof been admitted, could it, in justice, have been for more than the contingency of Mather becoming insolvent during the lives of the obligee and his *wife? In the course *617] of the argument, the counsel for the defendant were asked, but could not tell, on what principle the proof was to take place, or what was to be done with the amount of the dividend upon the sum at which the contingency of the insolvency of the grantor or the value of the annuity for the joint lives of the grantees was to be estimated; or what remedy the assignees of the surety would have had against Mather, the solvent principal.

It cannot be questioned here, that, as between Mather and the defendant, the relation of principal and surety subsisted; and all the reasons seem to me to apply which induced the Courts to hold, in *Thompson v. Thompson*, 2 New Ca. 168 (E. C. L. R. vol. 29), and numerous cases to the same effect, that, however great the hardship may be upon a surety that he should remain liable after he has surrendered all his effects upon a bankruptcy, the Legislature has as yet provided no relief for him, as it has confined the discharge of a bankrupt to debts and liabilities which might be proved, and for which a dividend might be obtained under the bankruptcy, and no machinery is yet provided for proof under the bankruptcy of the surety for a solvent principal.

I regret exceedingly that the question is not upon the record, so that the defendant might have had the opportunity of taking the opinion of a Court of error upon it: but we can only direct that the verdict on the plea of bankruptcy shall stand for the plaintiff.

Rule discharged.

***IN THE EXCHEQUER CHAMBER. [*618**

(Error from the Queen's Bench.)

MACGREGOR v. The Official Manager of The DOVER and DEAL Railway and CINQUE PORTS, THANET and COAST Junction Company.

The South Eastern Railway Company was incorporated for the purpose of making and maintaining that railway, with power to raise moneys for the purposes of the Act. The projectors of an intended Dover and Deal, &c., railway had contemplated bringing a bill before Parliament for the establishment of such railway, but were in doubt as to proceeding. M., a person interested, and having influence in the South Eastern Company, undertook that, if the projectors of the Dover, &c., Railway would proceed in endeavouring to obtain their Act, and if successful, would hand over their scheme to the South Eastern Company, that Company, if the bill were rejected, would insure them against loss by such rejection, and would pay their Parliamentary expenses. No clause in the Company's act empowered them so to apply their funds. The bill was proceeded with, and rejected by Parliament. In an action against M. on the above contract, the declaration alleging that the South Eastern Company did not insure, &c., and did not pay the Parliamentary expenses.

Held, by the Court of Exchequer Chamber on Error, that the stipulation by M. was a promise that the Company should do an act which was illegal and contravened public policy and a public statute, and that an action did not lie against M. upon such promise: and judgment, which had been given for the plaintiff below, was arrested by the Court of Error.

ASSUMPSIT. The declaration was originally by Lord Albert Conyng-
ham and others, the managing committee of the above-named Company;
for whom, after issue joined, the official manager was substituted on
suggestion under the Winding-up Act, 11 & 12 Vict. c. 45, s. 53. The
count recited that, before the making of the promise, &c., viz., on 15th
October, 1845, "a certain Company was formed and established for
the purpose of making a certain railway of the name (to wit) of The
Dover and Deal Railway, Cinque Ports, Thanet and Coast Junction Com-
pany, of which said Company the plaintiffs, before and at the time"
of defendant's promise after *mentioned, "were the managing
committee, and then had the management and control of the [*619
affairs of the said Company:" that the Company's objects were such
as could not be accomplished without the authority of Parliament, and
it was necessary, before proceeding with the works projected, to obtain
an Act of Parliament authorizing the same. "And whereas also,
before and at the time of the making of the promise of the defendant
hereinafter mentioned, doubts were entertained by the managing com-
mittee of the said Company as to whether it was expedient and advis-
able to proceed with the prosecution of the objects of the said Company
and to endeavour to obtain an Act of Parliament authorizing the exe-
cution of the works projected by the said Company, or whether it would
be advisable to abandon the prosecution of the said objects and abstain
from applying to Parliament for such an Act as hereinbefore mentioned:
And whereas also, before and at the time of making of the promise,"
&c., "certain negotiations were pending between the managing com-

mittee of the said Company and The South Eastern Railway Company, of which last-mentioned Company the defendant was then the chairman, as to certain propositions before then, viz., "on 7th November, 1845, "made by the said managing committee of the said first-mentioned Company to the said South Eastern Railway Company with a view to obtaining the support of the said South Eastern Railway Company to the objects of the said first-mentioned Company; and thereupon afterwards, and before the commencement of this suit, viz., "on 20th January, 1846, "in consideration that the managing committee of the said first-mentioned Company would not abandon the prosecution of the objects *of the said first-mentioned Company, but would, *620] on the contrary thereof, proceed therewith, and would, on behalf of the said first-mentioned Company, apply to Parliament for an Act authorizing the execution of the works projected by the said first-mentioned Company, and would use due and proper diligence in and about endeavouring to obtain such Act, and would hand over the said scheme firstly above mentioned to the said South Eastern Railway Company in the event of such Act being obtained, the defendant promised the plaintiffs that, in the event of the application to Parliament for such Act being rejected by Parliament, and of the said first-mentioned Company failing to obtain such Act, the said South Eastern Railway Company would insure the said Company of which the plaintiffs then were the managing committee as aforesaid against all loss which might be caused to the said Company by such rejection and failure as aforesaid, and would defray and satisfy to the said last-mentioned Company the whole of the expenses of such last-mentioned Company which should be by them incurred in and about the endeavouring to obtain such Act of Parliament; and that, in the event of the failure of such last-mentioned Company to obtain such an Act as aforesaid, the managing committee of the said last-mentioned Company should be at liberty to return to the allottees of shares in such Company without deduction the whole of the deposits on the shares of such Company." Averment, that the managing committee of the last-mentioned Company have always been ready and willing to hand over the said scheme to the South Eastern Railway Company in the event of such Act being obtained, and, relying on the said promise, did, to wit, on, &c., allot *621] divers, viz., 5805, *shares in the said Company, and receive divers suma, to wit, &c., as and for deposits on the shares so allotted: and that the said committee, relying, &c., did not abandon the prosecution of their objects above mentioned, but continually proceeded therewith, and, at a reasonable time in that behalf, viz., 1st May, 1846, applied on behalf of the Company to Parliament for an Act authorizing the execution of their works, and did continually use proper diligence in endeavouring to obtain such Act; of all which, &c.; averment of notice to defendant and to the South Eastern Railway

Company: And that afterwards, and before the commencement of this suit, viz., 22d June, 1846, the said application to Parliament was rejected, and the Dover, &c., Company wholly failed to obtain the same: averment of notice to defendant and the South Eastern Company. Further averment, that the South Eastern Company did not insure the Dover, &c., Company against loss by such rejection, nor defray the whole or part of their expenses in endeavouring to obtain such act, although they were, viz., on, &c., requested so to do, and a reasonable time had elapsed, &c.: but, although the expenses incurred by the Dover, &c., Company in endeavouring, &c., amounted to a large sum, &c., viz., 10,000*l.* (averment of notice), yet the same is still unpaid: and, although defendant afterwards, and before action brought, viz., on, &c., had notice of the premises and was requested by plaintiffs to pay to them or to the Dover, &c., Company the amount of the said expenses, and a reasonable time, &c., elapsed before action brought, yet, &c.: breach, non-payment.

Pleas: 1. Non assumpsit. 2. That plaintiffs were *not the managing committee of the first-mentioned Company in manner [*622 and form, &c. Issues thereon.

The cause was tried before Lord Campbell, C. J., at the London sittings after Trinity term, 1850, when a bill of exceptions was tendered, and a verdict was found for the plaintiff on both issues. Judgment for the plaintiff having been entered up in the Queen's Bench, the defendant brought Error in the Exchequer Chamber, assigning as error that the declaration was not sufficient in law. Errors were also assigned upon the matter shown by the bill of exceptions; it being objected, in substance, that the contract alleged in the declaration was not proved at the trial: there were also assignments of error as to joinder and non-joinder of parties; but the ground first stated is the only one material to this report.

The writ of error was argued in last Easter vacation, May 10th, before Maule, Cresswell, Williams, and Talfourd, Js., and Alderson and Platt, Bs.

Sir *F. Kelly*, Solicitor-General, for the plaintiff in error, defendant below.—First, the contract relied upon is illegal, inasmuch as the South Eastern Company, or their chairman on their behalf, could not lawfully undertake, out of their funds, to indemnify another Company for the expenses of carrying into effect that Company's undertaking. The South Eastern Railway Company is incorporated by stat. 6 & 7 W. 4, c. lxxxv., local and personal, public, sect. 1, "for making and maintaining the said railway and other works by this Act authorized, and for other the purposes herein declared;" but it is no part of those purposes that they should speculate in other railways, or contribute to their Parliamentary expenses. Sect. 3 *empowers them "to raise amongst themselves any sum of money for making and [*623

maintaining the said railway and other works by this Act authorized:" and sect. 4 enacts: "That the money to be raised by the said Company by virtue of this Act shall be laid out and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing this Act, and all other expenses preparatory or relating thereto; and the remainder of such money shall be applied in and towards purchasing lands, and making and maintaining the said railway and other works, and in otherwise carrying this Act into execution." These powers are not varied by any subsequent clause in the same Act (a) or by the later Acts regulating this Company's affairs. [CRESSWELL, J.—The clauses cited refer to moneys "to be raised by the said Company:" might the payment in question be made out of profits?] Nothing in the Act gives such a power. The application contended for is a breach of trust as to the shareholders and as to the public. This is sufficiently clear on principle: but there are several cases in Equity establishing the point, and one at law, *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 11 Com. B. 775 (E. C. L. R. vol. 73), which is decisive. The Act 6 & 7 *624] W. 4, *c. cvi., local and personal, public, by which the defendants there were governed, was the same in its material clauses, with regard to application of funds, as the *South Eastern Railway Act*. In that case three railway Companies were about to amalgamate under the authority of Parliament; and one of them had certain bills depending for purposes connected with its railway. The defendants covenanted with the three Companies to take a lease of their railways on certain terms, and to find capital for the works which were the subject of the depending bills, and to pay the costs of preparing and promoting such bills, whether passed or not. The action was brought by the three Companies, then amalgamated, for non-payment of such costs: and the Court of Common Pleas held that they could not recover, the contract by the defendants being beyond the scope of their statutory authority. Both parties were presumed to be aware of the public enactments which made such a contract a breach of trust; and therefore it was held void even as between themselves. It did indeed appear by the record in that case that some shareholders in the *Eastern Counties Railway* did not assent. [ALDERSON, B.—If all the shareholders had resolved to promote an undertaking not warranted by their Act, would that have made any difference? MAULE, J.—I do not think the want of assent

(a) Sect. 108 authorizes the making of a dividend out of the clear profits of the undertaking: sect. 115 empowers the directors to make calls to carry it on and defray its expenses: by sect. 205 the money produced by the sale of lands not wanted is to be applied to the purposes of the Act: by sect. 208, if the money to be raised under this Act by subscription should not be sufficient for the purposes of the Act, the Company may borrow a further sum (not exceeding, &c.) on mortgage: and, by sect. 209, they may, if they think it advisable, instead of so mortgaging raise money to the said amount by augmentation of their capital stock, such additional sum to be subject to the same provisions, &c. (with an exception not material), as if it had been part of the original capital stock.

was relied upon in the judgment: the ground was that the Company were only conditionally a corporation.] In the last cited case, reference is made to the words of Lord Langdale in *Colman v. The Eastern Counties Railway Company*, 10 Beav. 114, which are strong upon the point now before the Court. It may be contended on the other side that, in *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 11 Com. B. 775 (E. C. L. R. vol. 78), the [*625 action was against the Company as the contracting party; here an individual is sued, as having undertaken that something shall be done by the Company. But it is the chairman of the Company, who undertakes that they, the Company, shall do an illegal thing. [MAULE, J.—The chairman, legally, is in the same situation as a stranger to the Company. The corporation is ens rationis: the chairman or any other individual is a stranger to it. The averment that the defendant was chairman would not have been traversable. It is no more than saying that he was a person having influence; which is not a circumstance of any legal weight.] It is unnecessary, however, to discuss this point: no material distinction arises upon it. In *Beman v. Rufford*, 1 Sim. N. S. 550, another equity decision referred to in the *East Anglian Company's Case*, a railway Company agreed with two others that its line should be worked by the two, who should have perfect control, and exercise all the rights of the first-mentioned Company, for twenty-one years. Lord Cranworth, V. C., expressed a strong opinion that such a contract was illegal, but directed a case to be stated for a Court of law. No case, however, was submitted. The present contract, therefore, cannot be sustained, according to the authorities: it stands upon the footing of an undertaking by A. that B. shall commit a breach of duty, and do that which is against public policy, and a fraud upon parties who have pecuniary interests involved.

This agreement is also based upon the supposition that the South Eastern Company will be bound by a contract for which the only consideration is that the **Dover, &c., Company* will "hand over" [*626 to them the scheme depending before Parliament, if an Act should be obtained. But this is no consideration; for such a transfer is illegal and could not be carried into effect. [ALDERSON, B.—The meaning must be that the promoters of the scheme will try to get a power to transfer inserted in their Act.] The standing orders forbid such a clause.(a) Transfers of the kind are always made by a distinct Act, both parties being before Parliament for the purpose. Apart from the proposed transfer, the mere engagement to go on with the depending bill is no substantial consideration. [MAULE, J.—Might not parties undertake to do their best to obtain a transfer; or to procure an Act authorizing it? And would not such an undertaking be a good legal

(a) See standing orders of House of Lords as to private bills, 1855: clxxxix. 3, 9. Standing orders of House of Commons, 1855: 140, 141.

consideration?]) That is not the undertaking shown by this record. [MAULE, J.—Can you state, as a proposition of law, that there cannot be a legal transfer of any possible railway? And, if there may, must not it be understood that the parties contemplate a transfer by the legal means?]) If nothing on the record raises such a presumption, the Court will not make it. Lord Cranworth, V. C., was evidently inclined to deny the legality of such a transfer, in *Beman v. Rufford*, 1 Sim. N. S. 550. [MAULE, J.—That is in the case of a given railway: the opinion may not apply to all future ones.]

The Court then said that it would be convenient to hear *Channell*, Serjt., on this part of the case before entering upon the bill of exceptions.

*627] **Channell*, Serjt., for the defendant in error, plaintiff below.—The *East Anglian Railways Company v. The Eastern Counties Railway Company*, 11 Com. B. 775 (E. C. L. R. vol. 73), is, to a certain extent, an authority against the plaintiff below. But there the action was by one Company against another: here an individual undertakes that a Company shall do certain acts: and, supposing (which perhaps ought not to be assumed on motion in arrest of judgment) that the South Eastern Railway Company named in the declaration is the same with that incorporated and regulated by stat. 6 & 7 W. 4, c. lxxv., it is not to be taken for granted that the South Eastern Company could not have obtained power, by private Act or otherwise, to make the required transfer. In the case just referred to, the question, between two Companies, turned upon their statutory powers as then existing: the Company sued had no existence but by a statute; and its powers could be measured only by that. [MAULE, J.—We know, by a public Act, that there is such a corporation as the South Eastern Railway Company.] The case is not the same as if they were sued in that capacity. If the contract here was illegal, the matter which makes it so should have been averred in pleading: it does not appear conclusively on the face of the declaration. [MAULE, J.—I think the Court must intend that the South Eastern Company is that mentioned in the Act, and no other.(a)] Still the distinction remains, between the present case and that referred to, that the plaintiff here is not seeking to make the Company responsible out of its funds: and there is nothing illegal in a contract with a distinct party, binding him as a stranger, *628] that, in *consideration of a certain course being adopted, he shall pay a sum as an indemnity if the Company do not. [MAULE, J.—You say it ought not to be assumed in such a case that the thing to be done by the Company would be made illegal by a future Act.] That is so. The parties are merely anticipating that an Act will pass containing provisions consistent with their agreement; an event possible,

(a) See *Church v. The Imperial Gas Light & Coke Company*, 6 A. & E. 856, 7 (E. C. L. R. vol. 23).

at least. [MAULE, J.—Suppose the defendant below had wished to plead performance: must not he have pleaded that the Company had done that which the plaintiffs below expected to be done; that is, had defrayed their expenses?] It would have been enough to say that, in their default, defendant paid. [MAULE, J.—He could not plead that except by way of accord and satisfaction. CRESSWELL, J.—Suppose a man contracted to sell a void living; according to your argument it might be said, in support of such a contract, that an Act might pass to enable him. PLATT, B.—The argument might apply even to a contract that some one should commit a felony.] It would not apply if the thing were *malum in se*. But here the contract is not immoral or, properly speaking, illegal; there is merely an incapacity in the way. In such a case a party may lawfully insure the performance of the act; and that is, in effect, the contract described by the declaration. The defendant below might have supplied his Company with funds to defray the Dover and Deal Company's expenses. [MAULE, J.—To ascertain the legality of a contract we must see whether or not it would be lawful if fulfilled according to its terms. Here, if that were done, the payment (though under the circumstances supposed) would be a payment by the Company; which, according to the cases cited, *would be a mis- [*629 appropriation of their funds.] Things are legal and illegal in different senses. It would not be illegal to undertake that something should be done by a person not *sui juris*, as an infant, who could not legally contract. [MAULE, J.—Suppose the undertaking were that an infant should marry without proper consent.] That would be an evasion of the statute law, and against public policy. Here the undertaking is only that the Company shall do the thing if there be any legal mode; if not, that the defendant himself will satisfy the plaintiffs, or provide the Company with funds to do so. [MAULE, J.—Then the Company would be acquiring funds by means not authorized, and applying them to objects not authorized. It might as well be said that they could discount bills with money supplied to them for that object. They are not a corporation for such a purpose.]

Watson (in the absence of Sir *F. Kelly*), in reply, was stopped by the Court, who said that they would consider of this point before they determined upon hearing further argument. *Cur. adv. vult.*

ALDERSON, B., on a subsequent day of this Term (June 1st), delivered the judgment of the Court.

We do not think it necessary to hear the *Solicitor-General* in reply to the argument of my brother *Channell* in this case; nor to consider the questions involved in the bill of exceptions.

We are of opinion that the declaration does not state any sufficient cause of action, and that the judgment ought to be arrested for this defect. This involves the *reversal of the present judgment of [*630 the Court of Queen's Bench.

The declaration states that a certain Company had been formed for the purpose of making a railway from Dover to Deal, which required an Act of Parliament, and that doubts were entertained by the managing committee whether it was expedient to apply to Parliament, and that certain negotiations were pending between the managing committee and the South Eastern Railway Company, of which the defendant was the chairman, as to certain propositions made by the one Company to the other; and then it proceeds, that, in consideration that the managing committee would not abandon their objects, but would proceed therewith, and apply to Parliament for an Act to authorize the making of the Deal and Dover Railway, and would hand over the scheme to the South Eastern Company in the event of an Act being obtained, the defendant promised the plaintiffs that, in the event of the application to Parliament failing, the South Eastern Company would insure the Company of which the plaintiffs were managing committee against all loss which might be caused to the said Company by such rejection and failure, and would defray and pay all expenses which should be incurred by them in endeavouring to obtain the Act of Parliament. The declaration then proceeds to make the necessary averments stating the attempt and failure, and amount of expenses incurred, which the plaintiffs claimed from the defendant, the South Eastern Railway Company having failed to make them good.

The *Solicitor-General* argued that this promise of the defendant was in truth a promise that the South Eastern Railway Company should do *631] an illegal thing, and that *the promise was therefore void: and we are of that opinion. This is not like the promise of a party that an act impossible to be done shall be done by the defendant or by some third person; but it is a promise that an act shall be done contrary to the public law of the country, of which both parties are bound to take notice. The act is therefore illegal; and the promise that it shall be done is a void promise.

The question is, we think, determined by the decision of the Court of Common Pleas in *East Anglian Railways Company v. Eastern Counties Railway Company*, 11 Com. B. 775 (E. C. L. R. vol. 73). It is there laid down that a railway Company incorporated by Act of Parliament is bound to apply all the funds of the Company for the purposes directed and provided for by the Act, and for no other purpose whatsoever; and then, the defendants having, *inter alia*, covenanted to pay the costs of soliciting bills then pending in Parliament, it was held that the Act incorporating the defendants, being a public Act, must be presumed to be known to the plaintiffs, and that they could not recover, inasmuch as the covenant entered into by the defendants was beyond the scope of their authority as a corporation, and was therefore illegal and void. The Court there say that such a contract is illegal, because it is contrary to the Act of Parliament which was passed to give them

certain powers as a corporation for public purposes of advantage to the country at large as well as for the private profit of the individual members of the Corporation; and they add that the actual assent of the whole body of shareholders would make no real difference in the matter.

If this be so, both plaintiffs and defendant here must *be taken, with full knowledge of the powers conferred on the South Eastern Railway Company, to have made a contract by which the defendant is to bind the Company to do an illegal act; not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public Act of Parliament. This, we think, is a void contract, and one, therefore, which cannot form the proper ground for a suit in a Court of law. The declaration is, therefore, we think, bad: and the judgment ought to have been arrested in the Court below.

We think, therefore, that the judgment of the Queen's Bench must for these reasons be reversed, and that judgment be now arrested.

Judgment below reversed.

Judgment arrested.(a)

(a) See *Mayor of Norwich v. Norfolk Railway Company*, 4 E. & B. 397 (E. C. L. R. vol. 62); *Boston v. North Staffordshire Railway Company*, 4 E. & B. 796.

LOWE v. The LONDON and NORTH WESTERN Railway Company. May 26.(a)

Where any corporation has actually used and occupied land, for a corporate purpose, by permission of the owner, it is liable in assumpsit for use and occupation, though there be no contract under seal for such occupation.

Where the corporation so occupying is a railway company, within the provision of stat. 8 & 9 Viet. c. 16, Companies Clauses Consolidation Act, 1845, sect. 97, that any contract which, if made between private persons, would be valid though made by parol only, may be made by parol on behalf of the company by the directors, and shall bind the company, such parol contract may be presumed against the company in an action for use and occupation, in the absence of direct evidence to the contrary, upon proof of actual occupation by the corporation or its agent.

ASSUMPSIT for use and occupation. Plea: Non assumpsit. Issue thereon.

On the trial, before Jervis, C. J., at the last Spring *Assizes for Derby, it appeared that land of the plaintiff had been occupied as a place of deposit for bricks and other materials, used in constructing the works of the defendants, by a person alleged to be their agent. No written contract or authority to occupy the lands was proved. The London and North Western Railway Company are a corporation regulated by Acts of Parliament which incorporate The Com- [*633

(a) And Thursday, May 27th. Before Lord Campbell, C. J., Coleridge, Erie, and Crompton, J.

panies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16). The defence on the merits was, that the occupier of the land was a person constructing the works under a contract, and that the occupation was by him in his own right, and not as agent for the Company. It was also objected that, in point of law, the defendants, being a corporation, could not be made liable in this action unless the plaintiff could prove an authority, under the seal of the Company or at all events in writing signed by the directors, to occupy the lands.

The Lord Chief Justice gave leave to move to enter a nonsuit on this ground, and left it to the jury to say whether the defendants had in fact occupied by their agent. Verdict for plaintiff.

Macaulay, in last Easter Term, obtained a rule nisi to enter a nonsuit pursuant to the leave reserved, or for a new trial on the ground that the verdict was against evidence.

Miller, Serjt., and *Hayes* now showed cause.—It is not disputed that, in general, a corporation cannot contract by parol; but to this rule there are exceptions; *Beverley v. Lincoln Gas Light & Coke Company*, 6 A. & E. 829 (E. C. L. R. vol. 33), *Church v. *The Imperial* *634] *Gas Light & Coke Company*, 6 A. & E. 846 (E. C. L. R. vol. 33). One of these exceptions is where the promise is raised by implication of law, as in *Hall v. The Mayor, &c., of Swansea*, 5 Q. B. 526 (E. C. L. R. vol. 48). So a corporation cannot make an actual surrender of a lease but by deed under their seal; but, if they accept a new lease, this is a surrender in law of their first lease; 2 Bac. Abr. 266 (7th ed.), tit. *Corporations*, (E) 3. It is obvious, indeed, that a contract or authority implied by law cannot be under seal. Now, a promise to pay a reasonable satisfaction for lands held or occupied by the defendants is implied by law from the occupation, at least since stat. 11 G. 2, c. 19, s. 14. The question here, therefore, comes to be, whether the Corporation could, without making a writing under seal, occupy the lands. It has been repeatedly decided that a corporation may recover as plaintiffs in use and occupation; *Dean and Chapter of Rochester v. Pierce*, 1 Campb. 466, *The Mayor of Stafford v. Till*, 4 Bing. 75 (E. C. L. R. vol. 18), *Southwark Bridge Company v. Sills*, 2 Car. & P. 371 (E. C. L. R. vol. 12). It is difficult to see why the executed authority to occupy should be void if by parol, when the executed authority to permit to occupy is good. In *Finlay v. Bristol & Exeter Railway Company*, 7 Exch. 409, 415,† *Parke, B.*, says: "The defendants, a corporation aggregate, originally agreed by parol to take the premises in question for a year. Whether or no that agreement was binding, it is not necessary to determine; for, having occupied, they became liable, according to the authorities, to pay rent for the period they occupied; and in respect of that an action for use and occupation would lie." But in the present case all doubt is removed by *The Companies Clauses*

*Consolidation Act, 1845 (8 & 9 Vict. c. 16), sect. 97, which enacts that, "with respect to any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, such committee or directors may make such contract on behalf of the Company by parol only, without writing." The contract to pay for use and occupation is one which may be made by private persons without writing; and therefore it may bind this corporation if made by the directors without writing. Whether it was so made or not was a question for the jury. [*635]

(The arguments on the other ground of motion are omitted. The Court held that the rule, on this point, could not be supported.)

Mellor and Macaulay, contra.—The only exception, at common law, to the rule that a corporation can contract only by deed under seal is where the case is one of necessity, or at least of convenience amounting almost to necessity; *Church v. The Imperial Gas Light & Coke Company*, 6 A. & E. 846, 861 (E. C. L. R. vol. 38), *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, 822.† Here there was no reason why the authority to occupy should not have been under seal. It is true that corporations have been sometimes held entitled to sue in respect of a parol agreement, where the consideration has been enjoyed. But it does not follow, as has been contended on the other side, that corporations can be sued upon a similar agreement. The doctrine of mutuality in contracts does not apply to such cases. And the distinction between actions by, and actions *against a corporation upon a parol contract is noticed in the judgment in *Arnold v. The Mayor of Poole*, [4 M. & G. 860, 896 (E. C. L. R. vol. 43).] Moreover, in the present case, the consideration in respect of which the Corporation are sued is the enjoyment of land: land cannot be held by a corporation except under a sealed agreement; and therefore, if such agreement be wanting, they cannot be presumed to have held it. As, therefore, the consideration cannot be presumed to have been enjoyed, an action of assumpsit will not lie. [Lord CAMPBELL, C. J.—The liability here arises, not upon any express contract, but upon the fact of there having been an actual use and occupation, from which the law implies a promise. In *Finlay v. Bristol and Exeter Railway Company*, 7 Exch. 409,† Parke, B., was evidently of opinion that, if there had been an actual occupation by the defendants for the period there in question, they would have been liable in assumpsit in respect of that occupation.] Too much stress has been laid by the other side upon an expression of the learned Judge's opinion, which was a mere dictum, and not necessary to the case. [Lord CAMPBELL, C. J.—It agrees in principle with the decision of this Court in *Hall v. The Mayor, &c., of Swansea*, 5 Q. B. 526 (E. C. L. R. vol. 48). Where an executory contract only is relied upon, such contract may be void as against a corporation, if not under seal; but, where the consideration for it has been executed, an implied promise arises by law, which

does not require any agreement.] *Church v. The Imperial Gas Light & Coke Company* decides that it makes no difference whether the contract is executed or executory. And the law will not imply a promise *637] by a party *who can contract only under a certain form, where that form has not been followed; *Lamprell v. Billericay Union*, 8 Exch. 288.† [Lord CAMPBELL, C. J.—That case goes rather far; it must be considered as contradicting *Sanders v. St. Neots Union*, 8 Q. B. 810 (E. C. L. R. vol. 55). CROMPTON, J.—The Corporation here may contract by parol, under stat. 8 & 9 Vict. c. 16, s. 97. Ought we not to infer that everything has been rightly done, and that, if there be a parol contract, it has been made agreeably to the Act?] It was not suggested, at the trial, that the directors had entered into any contract under the statute. And, to sustain an action on such a contract, the authority of the directors to bind the Company must be regularly proved; *Ridley v. Plymouth Grinding & Baking Company*, 2 Exch. 711,† *Homerham v. Wolverhampton Waterworks-Company*, 6 Exch. 187.†(a)

Lord CAMPBELL, C. J.—I am of opinion that this rule must be discharged. The first point, the question of law, is one which the defendants were justified in advancing, but which I think does not afford any defence to the action. It is, that the defendants, being a corporation, are not liable in assumpsit for use and occupation, inasmuch as they cannot be bound by any contract not under seal. We must assume that the defendants have occupied the land with the consent of the plaintiff. Now *Dean and Chapter of Rochester v. Pierce*, 1 Campb. 466, and the *Mayor of Salford v. Till*, 4 Bing 75 (E. C. L. R. vol. 18), decide that a corporation may sue in assumpsit for use and occupation, where the land *638] has been occupied *with their consent. I think that the right is reciprocal, and that the party by whose permission a corporation has occupied lands may sue them in assumpsit for use and occupation. Then, in *Hall v. The Mayor, &c., of Swansea*, 5 Q. B. 526 (E. C. L. R. vol. 48), it was held that a corporation was liable to an action for money had and received in respect of sums which the law implied a promise by them to repay. That was not a case where the doctrine of necessity applied; the only necessity was the obligation which lies upon a corporation to pay its debts; and that necessity exists here. We are also bound to pay great respect to what fell from my brother Parke in *Finlay v. Bristol & Exeter Railway Company*, where he intimated that a corporation was liable in assumpsit for use and occupation, after having actually occupied and enjoyed the land with the consent of the owner. But, independently of these authorities, the Corporation here has an express power, under sect. 97 of the Companies Clauses Consolidation Act, 1845, to make a parol contract, through the directors, for an occupation of land which is necessary for carrying out the under-

(a) See *Smith v. The Hull Glass Company*, 11 Com. B. 897 (E. C. L. R. vol. 73); *Royal British Bank v. Turquand*, 5 E. & B. 248 (E. C. L. R. vol. 55).

taking; and, if such a contract be made, the Corporation is liable to be sued in assumpsit in respect of such occupation. That being so, we ought not to defeat the justice of the case by assuming that no such parol contract has been made, when its existence would obviate all difficulty. There was no evidence to negative the existence of such a contract; and we may, therefore, fairly presume it to have existed.

COLERIDGE, J.—I am of the same opinion. As to the first point, we may assume the jury to have found that the *defendants, by their agent, had occupied the plaintiff's land, by his permission, for [*639 the purposes of the Corporation. In the case of an ordinary individual, the law would, under these circumstances, raise a promise on his part to pay for that occupation, which would support an action of assumpsit. There are cases to show that a corporation also is liable upon an implied promise of this kind; and I do not think we ought to limit the authority of those cases. But, moreover, in the present case, the Corporation had clearly a right to make a parol contract, by means of their directors, for the occupation of land for the purposes of their undertaking. There is, then, no legal impediment to their making the same kind of contract as that which a private individual can make: and we must therefore infer that, if they make such a contract, they are subject to the same liabilities as a private individual. Independently, therefore, of the authorities, I think that this action is maintainable.

ERLE, J.—I am of the same opinion. I think there was evidence to go to the jury of an occupation of the plaintiff's land by the defendants for a corporate purpose. The decisions upon the question, whether, in respect of such an occupation, an action will lie against a corporation without proof of a contract under seal are, no doubt, conflicting. But the Court of Exchequer, which has always been disposed to maintain the exemption of corporations from liability in respect of contracts not under seal, laid down, in *Finlay v. Bristol and Exeter Railway Company*, 7 Exch. 409,(a) that, where a corporation had actually occupied land, they were liable to an action of assumpsit for use and occupation. Here, too, the *corporation have a statutory power to enter into parol contracts for corporate purposes: if, therefore, they enter [*640 into such a contract (and we have a right, in the absence of evidence to the contrary, to presume that they have done so here), the same liability attaches to them as would attach to an ordinary individual. I think, therefore, the action is maintainable.

CROMPTON, J., concurred.

Rule discharged.(b)

(a) See p. 416.

(b) See *Henderson v. Australian Royal Steam Navigation Company*, 5 H. & B. 409 (H. C. L. R. vol. 85).

CROSTHWAITE, Administrator, &c., of BARROW, deceased, v. GARDNER. *May 27.*

A. declared as administrator of B., stating that defendant, in B.'s lifetime, was indebted to B. in money to be paid by defendant to B. on request. It was proved that B. had contracted with defendant, in writing, to do certain works for him for 400*l.*, to be paid upon completion of the works: B. died before their completion; and A., before he had taken out letters of administration, agreed with defendant to complete, and did complete, the works.

Held, that these facts did not support the declaration, inasmuch as, the contract being entire, and the works unfinished at B.'s death, no debt accrued from defendant to B. in B.'s lifetime; although the new agreement with A. amounted, as between him and defendant, to a rescinding of the original contract, which would entitle A., as administrator, to sue on a quantum meruit in respect of the work done by B.

DEBT by plaintiff, as administrator of Robert Barrow.

The first count stated that defendant, in the lifetime of the said R. Barrow, was indebted to the said R. Barrow in 500*l.* for goods sold and delivered, work and labour, money paid, &c., and on an account stated; which sum was to be paid to Barrow by defendant on request. Breach, non-payment to Barrow in his lifetime, or to plaintiff as administrator. The second count was on accounts stated between defendant and plaintiff as administrator.(a)

*Pleas: 1. Ne unques administrator. 2. (to the first count) *641] Payment to Barrow. 3. Payment to plaintiff as administrator. 4. That Barrow had agreed with defendant to do certain carpenter's and joiner's work, and provide materials for the same, for 415*l.*, to be allowed in account to Barrow on the completion of the works; that Barrow executed and provided the greater part of the said work and materials, and that after his death plaintiff, as administrator, executed and provided certain other work and materials under the same contract; and that the accounts stated in the second count were of and concerning the last-mentioned work and materials solely, together with certain other debts due from defendant to Barrow in his lifetime. The plea then stated a set-off of money due from Barrow, in his lifetime, to defendant. The replication joined issue on the first three pleas, and, as to the fourth, alleged a discharge by defendant, in Barrow's lifetime, of the debt there pleaded by way of set-off. Issue thereon.

On the trial, before Cresswell, J., at the Liverpool Spring Assizes, 1852, it appeared that the intestate, Barrow, in April, 1850, agreed to do certain work for the defendant under a contract in writing to the following effect.

I, the undersigned Robert Barrow, agree with George Harrison Gardner, Esq., to perform the whole of the joiner's and carpenter's work of the new residence intended to be erected by the said G. H. G. at, &c.; all to be performed in the very best workmanlike manner, in every way according to the full intent and meaning of the plans, elevations, &c.; at and for the sum of 415*l.*

(a) This count was abandoned at the trial.

Barrow died in 1851, having completed a portion of the work under this contract. The plaintiff, before *he took out letters of administration, had agreed with the defendant to complete, and did [*642 complete, the remaining portion of the work specified in the contract; in respect of which portion the claim under the second count was made.(a) It was objected, for the defendant, that, as the contract between him and Barrow was an entire contract, no debt could accrue from the defendant to Barrow until the whole of the work had been completed, and that therefore, as Barrow had died before completing it, his administrator was not entitled, under this form of action, to sue for a proportionate sum in respect of what had been done. A verdict was found for the plaintiff for 92*l.*, leave being reserved to move to enter a nonsuit. *Knowles*, in last Easter term, obtained a rule nisi accordingly.

Atherton and *Cowling* now showed cause.—The plaintiff sues in his representative character for money due to the intestate in his lifetime; and the ordinary indebitatus count is the form in which such a claim ought to be stated. The only special count of which the plaintiff could avail himself would be a count for the non-completion of the contract by the defendant. But the plaintiff was not bound to bring his action in that form. The defendant could have compelled the intestate's representative to complete the contract; and the intestate's representative is therefore entitled to sue the defendant in respect of the work which the intestate had already performed. It is contended that the plaintiff cannot sue for a proportionate part of the sum agreed to be paid by the defendant under the contract, *because [*643 the intestate had not fulfilled his part of the contract at the time of his death. But the employment of the plaintiff by the defendant, upon the intestate's death, amounted to a rescinding of the original contract; and, upon its being rescinded, the defendant became liable to pay a proportionate part of the whole sum payable under the contract. The case is analogous to that of a servant hired for a year, and dying before the expiration of that time: his representative would be entitled to recover the proportionate amount of the yearly wages which was due at the servant's death. [Lord CAMPBELL, C. J.—I do not see how the averment that the defendant was indebted to the intestate *in his lifetime* can be supported.] As soon as the contract was rescinded, the defendant became, in contemplation of law, the intestate's debtor in respect of the work performed by him, and therefore liable to his representative. The Statute of Limitations would begin to run, not from the time of the rescinding of the contract, but of the performance of the work by the intestate. That shows that the liability of the defendant caused by the rescinding of the contract must be considered, by relation, as commencing in the intestate's lifetime. [Lord CAMPBELL, C. J.—Could not the count have stated that the defendant was indebted

(a) See p. 646, note (a).

to the plaintiff, as administrator, for work and labour done by the intestate?] That is certainly not the usual form. [CROMPTON, J.—It would be correct. If a purchase had been made from the intestate, for which payment was to be made on a day which happened after his death, his representative might sue for the purchase-money under a similar form. [Lord CAMPBELL, C. J.—The difficulty here is something like that *644] which arose in **framing an indictment in the Case of the Regicides*, Kelyng, 7, 10, where it was a question in whose reign the crime should be stated to have been committed.]

Knowles and Joseph Addison, contra.—If the original contract had been rescinded by mutual agreement between the intestate and the defendant, the plaintiff, as administrator, could have recovered, under the present form of action, a proportionate part of the sum originally agreed to be paid. But, as the contract was rescinded after the death of the intestate, the defendant was not indebted to the intestate in his lifetime; and therefore the count is improperly framed. In order to recover under the declaration as laid, it must be shown that the intestate himself could have recovered in his lifetime: and it is clear that he could not have done so, the contract not having been then rescinded; *Sinclair v. Bowles*, 9 B. & C. 92 (E. C. L. R. vol. 17). As to the argument on the Statute of Limitations: in *Cowper v. Godmond*, 9 Bing. 748, (a) where an action was brought to recover the consideration-money of an annuity which had been granted more than six years before and had been avoided, at the instance of the grantor, within six years, it was held that the statute did not begin to run till the annuity had been avoided. *Churchill v. Bertrand*, 3 Q. B. 568 (E. C. L. R. vol. 48), (where an administratrix was sued for purchase-money of an annuity granted by the intestate and set aside by her after his death), is to the same effect. The plaintiff should have declared either on a special count, setting out the *645] original contract, the **rescinding* of it, and the accruing of the defendant's liability to the plaintiff in consequence of such rescinding, or in the form which has been suggested by the Court, of an *indebitatus* count stating that the defendant was indebted to the plaintiff, as administrator, in respect of work and labour performed by the intestate.

Lord CAMPBELL, C. J.—I am sorry that this objection should prevail; but I do not see how it is to be got over. The declaration states that the defendant, in Barrow's lifetime, was indebted to Barrow in money which was to be paid to him on request. Now that allegation is not proved by the agreement which was put in evidence; for by that it appears that Barrow was to be paid only upon completion of the works. Evidence, however, was given of a subsequent agreement between the plaintiff and defendant which amounted to a rescinding of the original contract; and it was contended that, upon such rescinding, the

(a) See *Huggins v. Coates*, 5 Q. B. 432 (E. C. L. R. vol. 48).

plaintiff became entitled to recover for what had been done by Barrow. But it is clear that he could not recover it as a debt due from the defendant to Barrow in his lifetime; for, during Barrow's lifetime, the original contract was in full force. I think that the rescinding of it amounted to an agreement by the defendant to pay for what had been already done, upon a quantum meruit or a quantum valebat; but that agreement took place after Barrow's death, and cannot support a claim for a debt due to Barrow in his lifetime. It was said that the original contract must be considered as having been put an end to ab initio, and as having never existed. But such a doctrine would lead to various absurdities and contradictions. For instance, if an action had been *brought by Barrow in his lifetime, while the original contract was pending, a rescinding of the contract upon the very day of [*646 trial would give the plaintiff a good cause of action, though he had not one when the writ was issued. As to the argument upon the Statute of Limitations, it is clear that the statute would run from the rescinding of the contract; otherwise it would run from a time at which the action had not accrued. I think, therefore, that the original contract must be considered as in force until the time at which it was rescinded. The first count, therefore, is not proved. I do not see that there was any difficulty in framing a proper count, or in amending at the trial.

COLERIDGE, J.—I also regret that this rule must be made absolute; but the law is clear. The declaration alleges that the defendant was indebted to Barrow, during his lifetime, in money to be paid to him upon request. Now before Barrow's death there was no debt at all due. Between that time and the rescinding of the original contract there was an interval during which Barrow's representative, if there had been one, might have sued, though not in the present form, for the work already done. Then comes the question, whether the rescinding of the original contract, after the death of Barrow, creates, by relation, a debt due to Barrow in his lifetime. I see no ground upon which such a view can be justified, which is, in fact, contrary to the very meaning of the word rescinding. I am therefore of opinion that the declaration cannot be supported.

ERLE, J.—I am of the same opinion. The rules of pleading do not admit of this form of action being *supported by the evidence which was brought forward at the trial. I think the powers of [*647 amendment given to the Court at Nisi Prius might have been exercised in favour of the plaintiff, if an application to that effect had been made.

CROMPTON, J., concurred.

Rule absolute.

Ex parte DEATH. May 28.

The governing body of a University may lawfully issue a decree that every tradesman with whom a person in statu pupillari within the University contracts a debt exceeding 5*l.* shall make the same known to the tutor of such person's college, on pain of being discommuned if he omits doing so: and in case of disobedience, they may enforce such decree by ordering that no person in statu pupillari shall deal with the tradesman for a given period.

If the Vice-Chancellor, attended, on summons, by the Heads of Colleges, makes an order to discommune, in pursuance of such decree, this is not a judicial proceeding which the Superior Courts can restrain by prohibition.

It makes no difference, as to these points, that the decree contains other distinct regulations which it requires licensed victuallers to comply with on pain of being deprived of their licenses.

The proceeding for the purpose of discommuning does not become judicial by the Vice-Chancellor, through his officer, giving notice to the party complained of that the meeting will be held at a given time and place, and summoning him or giving him liberty to attend, for the purpose of answering the complaint or offering explanation: nor is the party entitled, on that account, to demand admittance for his attorney.

WATSON moved for a rule calling on the Vice-Chancellor of the University of Cambridge, and the several Heads of Colleges there, as also on the Rev. Michael Angelo Atkinson, M. A., to show cause why a prohibition should not issue to restrain all proceedings in respect of a certain complaint by the said M. A. Atkinson against John Death for an alleged violation of a certain decree or edict made by the Vice-Chancellor and Heads of Colleges of the said University on 11th February, 1847.

The motion was grounded on an affidavit of John Death, stating: *648] That Courtenay John Vernon, formerly *student of Trinity College, Cambridge, being indebted to deponent in 143*l.* 1*l.* 6*d.*, deponent, in March, 1852, instructed his attorney to apply by letter for payment; and deponent's attorney, by his direction, wrote a letter to the Rev. M. A. Atkinson, tutor of the said College, stating his intention to sue Mr. Vernon for the debt; and that deponent accordingly commenced an action in the Court of Queen's Bench against Mr. Vernon, who soon afterwards paid the debt and costs. That Mr. Vernon was not living in or near the University when the letters were written and action brought. And that no tutor of the said College required deponent to send notice to him of the amount of the said debt at the end of every quarter or at any other period. That, on 8th May, deponent was served with the following summons under the hand and seal of office of the Vice-Chancellor.

“Cambridge University, to wit. To John Crouch, Yeoman Bedell. Whereas the Rev. M. A. Atkinson, Master of Arts and tutor of Trinity College in this University, has made information before me that John Death, horse dealer and livery-stable keeper, of Jesus Lane, Cambridge, has allowed Courtenay John Vernon, student of Trinity College and a person in statu pupillari, to contract with him the said John Death a debt exceeding the sum of 5*l.* without sending notice of the same at

the end of every quarter to the said M. A. Atkinson, in violation of a decree of the Vice-Chancellor and Heads of Colleges dated February 11th, 1847: You are hereby authorized and directed to summon the said John Death before me at King's College Lodge on Monday next the 10th instant, at the hour of 11 o'clock in the forenoon, to answer the said complaint.

"Given," &c., "the 8th day of May, A. D. 1852.

"RICHD. OKES, Vice-Chancellor of the University." (L. S.)

*The deponent stated that, at the prescribed time, he went to King's College Lodge to answer the complaint, with an attorney, Mr. Cooper, whom he had retained "for the purpose of advising and assisting him in making his defence to the said complaint;" but, admittance being denied to the attorney, deponent did not enter the Lodge. The attorney, who claimed admission both in that character and as one of the public, made several attempts afterwards to go in, as did other persons; but they were prevented from doing so. On May 21st the School-keeper of the University served the deponent with a document in these terms. [*649

"May 21st, 1852.

"I am desired to inform you that there will be a meeting of the Vice-Chancellor and Heads of Colleges on Monday the 24th inst., at King's College Lodge, at 11 o'clock in the forenoon, to hear the complaint made by Mr. Atkinson of Trinity College of your not having complied with the regulation which requires tradesmen and others to give notice to tutors of Colleges of debts incurred by their pupils; and that you are at liberty to attend, if you please, for the purpose of giving any explanation, but that you must come alone. THOS. JOHNSON, for the University Marshal. To Mr. John Death, of Jesus Lane, horse dealer and livery-stable keeper."

The deponent had no other notice or knowledge of the said complaint; nor any other summons to appear and answer. He did not attend the meeting, but was informed and believed that it was attended by the Vice-Chancellor, several Heads of Colleges, the Registrar, and the complainant: and, on the said 24th May, the said Vice-Chancellor and certain Heads of Colleges, for *and in respect of the matter of the said complaint of the said M. A. Atkinson, pronounced the deponent to be discommuned until the end of next term. [*650

On May 25th, a printed decree in the following terms was posted up in the several Colleges.

"King's College Lodge, May 24th, 1852.

"Whereas it has been proved that John Death, horse dealer, of Jesus Lane, has neglected to comply with an edict of the Vice-Chancellor and Heads of Colleges, by which all tradesmen and dealers with whom any person in statu pupillari shall have contracted a debt exceeding the sum of 5*l.* are required to send notice of the same at the end

of every quarter to the College tutor of the person so indebted, and warned that unless they do so they will be discommuned: It is ordered and decreed by the Vice-Chancellor and Heads of Colleges whose names are underwritten, that, from the present date until the end of next term, no person in statu pupillari shall either directly or indirectly contract, bargain, buy or sell, or have any tradings or dealings with the said John Death: and, that, if any person in statu pupillari shall presume to disobey this decree, he shall for his misdemeanor and contumacy be punished by suspension, rustication, or expulsion, as the case shall appear to the Vice-Chancellor and the Heads of Colleges to require.

“Rd. Okes, Vice-Chancellor. Gilb. Ainslie. Geo. Archdale. R. Tatham. W. Whewell. H. Philpott. J. Cartmell. G. E. Corrie. J. Pulling. T. Worsley. T. E. Geldart.

“N. B.—The description of persons ‘in statu pupillari’ comprehends all undergraduates and bachelors of arts.”

*651] The deponent further stated information and belief *that the Vice-Chancellor and Heads of Colleges intended to enforce the said decree. He added that his principal customers were students of the University: that, as he believed, the enforcement of the decree would cause him a pecuniary loss of 450*l.*: and that he was not, and never had been, a member, or servant to a scholar, of the University, or a common minister thereof.

The attorney, Mr. Cooper, who was town clerk of the borough of Cambridge, made an affidavit, citing the charters of Edward III., Richard II., and Queen Elizabeth, which give to the Chancellor of the University of Cambridge exclusive cognisance of pleas where a master, scholar, scholar's servant, or common minister, of the University is a party; and stat. 13 Eliz. c. 29, confirming the said charters. The affidavit went on to state: That the right to make statutes for the government of the said University is vested in the Regent and Non Regent Doctors and Masters of the said University, commonly called the Senate; but that certain statutes for the government of the said University have from time to time been made by the Crown and accepted by the senate of the said University, and that the principal or governing body of statutes was made by Queen Elizabeth in the 12th year of her reign: and that, under such statutes, the Chancellor and Heads of Colleges are empowered to explain and determine doubts in the said statutes; and that thereby the Chancellor, with the consent of the Heads of Colleges, is empowered to assign and impose penalties for the violation of such statutes in all cases where no express penalty is by the said statutes imposed. That the Vice-Chancellor and Heads of Colleges of the said University have been accustomed from time to time to make decrees *652] which, *although not warranted by the limited powers vested in them by the said statutes, or by the constitution of the said Uni-

versity, have for the most part related exclusively to the junior members of the said University, who not being in a situation to contest their validity, such decrees have been submitted to; but that (with few and for the most part recent exceptions) the Vice-Chancellor and Heads of Colleges have not attempted to make decrees relating to the inhabitants of the town of Cambridge: and that in several of the excepted cases such decrees have been successfully resisted by the inhabitants of the said town. That, on 11th February, 1847, the Vice-Chancellor and Heads of Colleges, without (as deponent verily believes) having any lawful power or authority so to do, made certain decrees, of which a copy hereafter follows, viz.

“St. Catharine’s Hall Lodge, Feb. 11, 1847.

“Whereas, it is highly injurious to the good order and discipline of the University that facilities should be afforded to persons in statu pupillari to contract without the knowledge of their tutors large debts, or debts with a long extension of credit, notice is hereby given that, if any vintner or victualler shall be proved before the Vice-Chancellor to have permitted, after the date hereof, any person in statu pupillari to contract a debt for wine or spirituous liquors exceeding the sum of 10*l*. without the knowledge and consent of the tutor of such person, he shall be deprived of his license. Also that every vintner or victualler with whom any person in statu pupillari shall hereafter contract any debt for wine or spirituous liquors shall be required to send notice of the amount of the same at the end of each quarter to the College tutor of the person so indebted, on pain of *deprivation of his license if he shall be proved to have neglected to comply with this regula- [*653 tion. Notice is also hereby given that every tradesman or dealer with whom any person in statu pupillari shall hereafter contract a debt exceeding the sum of 5*l*. shall be required to send notice of the amount of the same at the end of every quarter to the College tutor of the person so indebted, on pain of being punished by discommuning or otherwise as to the Vice-Chancellor and Heads of Colleges shall seem fit. Also that, if any vintner, victualler, tradesman, dealer, or other person, shall take from a person in statu pupillari without the knowledge and consent of his College tutor a promissory note, he shall for so doing be punished by deprivation of his license, by discommuning, or otherwise, as to the Vice-Chancellor and Heads of Colleges shall seem fit.

“H. Philpott, Vice-Chancellor. Herbert Jenner Fust. G. Neville Frenville. G. Thackeray. William Webb. W. French. J. Lamb. Gilbert Ainslie. John Graham. Geo. Archdall. R. Tatham. W. Hodgson. B. Chapman. Rob. Phelps. W. Whewell. T. Worsley.”

The deponent further stated: That the earliest notice which he has met of the said University proceeding to punish any inhabitants of the town of Cambridge by prohibiting the scholars of the said University from dealing with them occurs in the reign of Henry VII., in (as this

deponent believes) the year 1493 ; when it appears that that King addressed letters missive to the Vice-Chancellor, Commissary, Proctors and Scholars of the said University, requiring them to revoke and pull down certain prohibitions they had set up in divers places within the said University commanding thereby that no man should buy or sell with divers burgesses of the said town.

*654] *That, on 8d November, 1575, the Senate of the said University made a statute or decree that, if any of the townsmen should impugn the liberties, privileges, or customs of the said University, or exhibit gross ingratitude against the University, the scholars or their servants, and should be thereof convicted by the judgment of the Vice-Chancellor and the major part of the Heads of Colleges and other doctors then in the University, no scholar, nor any one living under the privilege of scholars, should contract, buy, or sell with such ungrateful person under the penalty of 100 shillings, to be paid to the common chest of the said University as often as they should attempt anything against that decree.

That, on 27th May, 1587, the Vice-Chancellor and the major part of the Heads of Colleges and other doctors then in the said University made a decree prohibiting under the penalty of 100 shillings any scholar or person having scholar's privilege to buy, sell, contract, or communicate with John Edmunds, then Mayor of the said town of Cambridge, on account of his ingratitude to the said University and the scholars thereof and their servants.

That, on 4th September, 1587, the Senate passed two graces, which were set forth : The first, after a preliminary recital, proceeded : " May it please you," &c., " to have it decreed," &c., that any burgess, suing out writs in the courts at Westminster, tending to the hurt and impeachment of the liberties and privileges of the University, shall " be presently accounted and be as a person or persons discommuned from the society and benefit of this University in all respects and to all purposes in such sort as it may appear it hath been in such cases practised and used ; and that every person, scholar, scholars, servant, or public *655] minister of the University either *wittingly or of wilful negligence contracting or bargaining with the said person or persons or any other by your authority upon other causes lawfully discommuned, and thereof convicted before the Vice-Chancellor for the time being and the greater part of the Heads of Colleges and doctors in the University, and by them so adjudged, shall by virtue of this your ordinance and statute therein be utterly made void and incapable of any degree, office, or other benefit or privilege unto the University belonging, besides the mulct already provided, until he be thereunto restored by your common consent in this place therein obtained." The second grace provided for better making known the names of discommuned persons.

The affidavit then stated further instances of discommuning in 1629

and 1705 (for other offences than that of suing out process at Westminster against members of the University); and it concluded as follows. "That within the last twenty-six years various persons have been discommuned by the Vice-Chancellor and Heads of Colleges for various alleged offences said to have been committed by such persons, and whereof they have been convicted by the Vice-Chancellor and Heads of Colleges. That in the Court of the Vice-Chancellor of the said University (which under the said letters patent of Queen Elizabeth is a Court of record) the Heads of Colleges usually act as assessors or assistants to the said Vice-Chancellor: yet, although it has been decided by this Honourable Court that there is no such Court in the said University as the Court of the Vice-Chancellor and Heads of Colleges (notwithstanding that in certain cases the statutes of the University require the assent *of the major part of the Heads of Colleges to the punishment to be inflicted by the said Court), deponent is informed [*656 and verily believes that the Vice-Chancellor and Heads of Colleges now claim to have the power to inflict punishments for the violation of the decrees made by them, and allege that in such cases they can proceed without summoning the party accused or giving him due notice of the charge against him; that such party, if he attends, can only do so by grace and favour and not as of right; that he is not entitled to any legal assistance in making his defence to the charge; that the public have no right whatever to be present at any of the proceedings in relation to such charge or the investigation thereof; and that such proceedings are not to be considered as taking place in a Court, although, as this deponent is informed and verily believes, the Registry of the University (who is the proper officer of the Vice-Chancellor's Court) attends on all occasions when the Vice-Chancellor and Heads of Colleges meet to consider such cases, and records the proceedings of the said Vice-Chancellor and Heads of Colleges upon and concerning such cases."

Watson now contended that the decree of 1847, the supposed authority for the proceedings complained of, was one which the Vice-Chancellor and Heads of Colleges had no power to make; and he referred to the statutes of the University, and constitution of the Vice-Chancellor's Court, as shown in *Rex v. The Chancellor, &c., of the University of Cambridge*, 6 T. R. 89. [Lord CAMPBELL, C. J.—If the decree of 1847 is a nullity, does the case *admit of a prohibition?] [*657 There is a summons to appear before the Vice-Chancellor; the proceeding assumes to be judicial; and the result is a heavy penalty upon the party now moving. [Lord CAMPBELL, C. J.—If the Vice-Chancellor chooses to withdraw the license which a person had to receive undergraduates in his house, can that party claim to attend the hearing of the case with attorney and counsel?] This is not a case of license. The tradesman has a right to carry on his business. If the

proceeding is said to be one instituted before the Vice-Chancellor and Heads of Colleges, the answer is, that there is no such body for this purpose. [Lord CAMPBELL, C. J.—Can this proceeding be the subject of a judicial prohibition? COLERIDGE, J.—Might not the Vice-Chancellor and Heads of Colleges in the exercise of their proper authority forbid any dealing at all with the undergraduates?] The steps are taken here in judicial forms. [Lord CAMPBELL, C. J.—You must look to what is actually done. COLERIDGE, J.—These proceedings relate to persons in statu pupillari. Suppose a boy at Eton were forbidden to deal at a particular shop and did so, and the case were such that the head master ordered every boy to forbear dealing at that shop: could such an order be contested? CROMPTON, J.—The forms here amount to no more than telling the tradesman what is about to be done, and allowing him to be heard.] In the case *In re The Chancellor, &c., of Oxford and Taylor*, 1 Q. B. 952 (E. C. L. R. vol. 41), and in *Speakman's Case*, 1 Q. B. 965, note (a) (E. C. L. R. vol. 41), there cited, discommuning, at Oxford, was treated as a proceeding of the University Court. Here, the proceeding is either in the Vice-Chancellor's *658] Court or in a Court (of the Vice-Chancellor and Heads of Colleges) *which does not exist for such a purpose. The letters missive in the cases of discommuning under Henry VII., mentioned in the affidavit of Mr. Cooper, were in the nature of a prohibition. The power, therefore, to make the decree of 1847 may be now disputed. [Lord CAMPBELL, C. J.—If the University exceed their jurisdiction over their own pupils, can we question that act in a prohibition?] Virtually, the proceeding is an imposition of penalty upon the tradesman. [Lord CAMPBELL, C. J.—That is not the object: it is, to prevent the pupils from incurring debts which they are not able to pay. COLERIDGE, J.—Suppose they ordered that no person in statu pupillari should have more than three coats, and forbade dealing with any tradesman who would supply more.] They might discommune for the most frivolous reason; as, if a tradesman kept his shop open beyond a certain hour. [Lord CAMPBELL, C. J.—Well: would a prohibition lie? COLERIDGE, J.—What would apply to the University would apply to schools, great and small.] Masters of schools are not judicial officers. [COLERIDGE, J.—You assume that the Vice-Chancellor and Heads of Colleges acted as judicial officers here.] The decree of 1847 gives powers beyond that of discommuning, and which imply a judicial authority. The subject is an important one, and at any rate fit to be fully discussed.

Lord CAMPBELL, C. J.—To grant this rule would be interfering most improperly with the discipline of the University. I approve highly of the decree of 1847: I think it legal, and should be sorry if there were any obstacle to its being enforced. No ground of objection has been *659] shown. There is no judicial proceeding: only *a regulation is made, and a very wholesome one for those under the care of the

University, that they shall not be permitted to run up debts of a certain amount without notice being given to a tutor. Discommuning is only giving a caution to persons in statu pupillari not to deal with certain tradesmen. There is no proceeding in the Court of the Vice-Chancellor. We notice that Court, which is a very ancient one: but here no summons to a Court was issued: nothing more was done than to give this horse-dealer an opportunity of satisfying the Vice-Chancellor and Heads of Colleges that he had not pursued the course of conduct imputed to him. To say that before such a domestic forum a party is entitled to come attended by counsel or attorney is a proposition not tenable. It is true that, in the decree of 1847, other punishments than that of discommuning are mentioned; but in the case before us no attempt has been made to do more than discommune, which was merely directing those in statu pupillari not to deal with the particular tradesman.

COLERIDGE, J.—I see nothing here like an attempt to assume powers which do not exist. Nothing more has been done by the parties against whom this application is made than to enforce upon the young men under their charge a regulation which is quite within the competence of the governing body of a place of education. It is contended that the proceeding was judicial because there was a meeting, a notice to the present applicant, and a complaint depending: and therefore that he had a right to be heard. But we must look to the substance of the proceeding. The Heads of the University took these steps, desiring to enforce a *sumptuary regulation, but wishing not to allow this party to be injured without an opportunity of showing that he [*660 ought not to be affected by it. That does not give him the rights which he now claims. It is said that the case is of importance and ought therefore to be entertained: but in dealing with a great place of education it would be mischievous to encourage a doubt upon a subject of this kind, as to which we see none. If the proceedings in question could be viewed in the light of a judicial inquiry, a pupil might next say that he had a right to be judicially heard before he was forbidden to deal at a particular place.

ERLE, J.—I am of the same opinion, and think that this was no judicial proceeding.

CROMPTON, J.—If these proceedings had been as wrong as I think they were right and useful, I should be unwilling to interpose. The steps which were taken are not judicial because a decree and a summons form part of them. The summons amounted to no more than saying, "We wish to hear you before we do that which will be to your prejudice." Such a notice does not turn the proceeding into a judicial one.

Rule refused.

*661] *HANNAH MARTYN, Administratrix, &c., of RICHARD LOMAX MARTYN, Clerk, deceased, v. CLUE. May 23

Declaration in covenant, by lessor against assignee of lessee, set forth a covenant by lessee, for himself, his heirs, executors, administrators, and assigns, that he and they would take the premises, from, &c., for fourteen years, and would pay the rent; and that lessee, his executors and administrators, would, at his and their own cost, repair and put into tenantable repair the demised premises, he, the lessee, having been already paid by lessor 400*l.*, the valued amount of the then present dilapidations exclusive of rough timber, but not on the stem, which was to be allowed by lessor, his heirs and assigns, on the demised premises: and that, after the premises should have been put into such repair, lessee, his executors, administrators, and assigns, would at his and their proper cost, from time to time repair and keep in tenantable repair the demised premises, being allowed rough timber but not on the stem, upon the demised premises; the timber to be fetched and carried at the expense of lessee, his executors, administrators, and assigns: and the said premises so repaired and kept, together with the possession of the said premises, should yield up to lessor at the expiration of the said term: and should not cross-crop the land, nor commit any waste, &c., but should cultivate the land in a good husbandlike manner and according to the custom of the country. The count then averred every of the lessee, and assignment by him to defendant, who entered, and was possessed until the expiration of the term.

Breach: That, although lessor, from the time of making the lease till the assignment, was ready and willing at all times to provide for lessee, and, from the assignment till the expiration of the term, was ready and willing to provide for defendant and lessee, on the demised premises, sufficient rough timber, not on the stem, to enable them to repair and put into tenantable repair the said premises, and although lessee did not before the assignment or at any time repair or put into repair the said premises: yet defendant did not after the said assignment repair or put into repair the said premises, nor yield up the same well repaired at the expiration of the term, but suffered them to be ruinous, &c., for want of repair, and so left them at the expiration of the term. Also that defendant, after the assignment, cross-cropped the land and did waste, and used and cultivated the land in a bad and unhusbandlike manner, and not according to the custom of the country.

Defendant pleaded, among other pleas, as to suffering the premises to be ruinous and out of repair, and so leaving them: That lessor did not at any time from the assignment till the expiration of the term provide on the premises sufficient rough timber, not on the stem, to enable defendant to repair, nor any rough timber whatever. And he demurred specially to the declaration. Plaintiff demurred to the plea.

Held that the declaration was good: For

1. The covenant to put in repair ran with the land, and bound the assignee, though the lessee, in this part of the deed, covenanted only for himself and his executors and administrators. And that the payment of 400*l.* to the lessee was no ground for construing this covenant as limited to him personally.
2. It was sufficient, on this record, to aver that the lessor was always ready and willing to furnish timber, without stating that he actually did furnish it.
3. A covenant to yield up in repair at the end of a term runs with the land and binds an assignee, though not named.
4. Breach of a covenant to cultivate according to the custom of the country is sufficiently averred by stating that defendant did not so cultivate, without specifying instances.

Held also that the plea was bad, for that the condition precedent to the defendant's obligation to repair was sufficiently performed if he was ready and willing to supply timber when required.

*662] COVENANT. The declaration stated that, by indenturedated 31st December, 1836, between *intestate of the one part and one William Elliott of the other part (profert), the intestate, R. L. Martyn, demised to Elliott certain messuages, buildings, farms, lands, and premises with the appurtenances, situate in Sussex, and all tithes of corn, &c., together with the game, &c., and also all common rights, &c., belonging thereto: excepting and reserving to Martyn, his heirs and assigns, all timber trees, tillers, saplings and young trees, and the

bodies of all pollards, oak, ash, elm, beech, fir, and chestnut, and all mines of iron, &c., and quarries of stone, then standing, growing, lying, or being, or to stand, grow, &c., in, upon, or under the demised premises or any part thereof: Habendum to Elliott, his executors, administrators, and assigns, from 29th September, 1836, for fourteen years then next, &c., yielding and paying therefore the yearly rent of 120*l.*, &c.: And that Elliott, "for himself, his heirs, executors, administrators, and assigns," covenanted to and with Martyn, his heirs and assigns, that he, Elliott, would pay the said rent, &c., and also that he the said W. Elliott should and would (a) at his "own sole and proper costs and charges repair and put into good and sufficient tenantable repair all the said messuages, cottages, barns, stables, malhouses, hop-kilns, and other agricultural buildings, and the windows, walls, fences, gates," &c., "and other enclosures of all *or any* part of the said demised premises; he the said W. Elliott having been *then* already [*663 paid or allowed by the said R. L. Martyn the sum of 400*l.* 17*s.* 8*d.*, being the amount of a valuation of the *then* present irreparations and dilapidations of the said messuages and other buildings, farms, lands, and premises, made for the purpose of ascertaining the same by Mr. Thomas Chrippes, exclusive of naked rough timber but not on the stem, which *was* to be allowed by the said R. L. Martyn, his heirs and assigns, on some part of the said demised premises. And, after the said messuages, cottages, and buildings, farms, lands, and premises," should "have been put into such good and sufficient tenantable repair to the satisfaction of the said R. L. Martyn or his surveyors, then that the said W. Elliott, his executors, administrators, and assigns," should and would "at his and their like proper costs and charges from time to time and at all times during the remainder of the said term maintain, uphold, fence, repair, and keep in good and sufficient tenantable repair, all the said messuages, cottages, barns, stables, malhouses, hop-kilns, and other buildings, farms, lands, hereditaments, and premises, and every part thereof" thereby demised, in, by, and with all proper and necessary reparations and amendments whatsoever; "being allowed naked rough

(a) In the deed, as set out on over, the words immediately following the habendum and reservation of rent were: "And the said William Elliott, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree with and to the said Richard Lomax Martyn, his heirs and assigns, in manner following, that is to say: that he the said W. Elliott, his executors, administrators, and assigns, will take and hold the said messuages," &c., "and premises hereinbefore demised," &c., "from the 29th day of September now last past, for and during," &c. (fourteen years): "And also that he and may shall and will well and truly pay or cause to be paid to the said R. L. M., his heirs and assigns, the said yearly rent," &c., "and also shall and will from time to time and at all times during the said term" pay all parochial, parliamentary, and other taxes, &c., wherewith the premises shall or may be taxed, &c., "the land tax and quit rent, if any, excepted: And also that the said William Elliott, his executors and administrators, shall and will at his and their own sole and proper costs," &c.; continuing as in the text.

The words between inverted commas which follow as far as p. 665, post, are the same as those of the deed, except the words in Italics. "*Then*" was not in the deed; and "*was*" is substituted for "*is*."

timber (but not on the stem), bricks, tiles, and stones on the said demised *664] *premises or within five miles thereof, the stones to be dug, and, with the timber, bricks, tiles, and all other materials, to be fetched and carried, by and at the expense of the said W. Elliott, his executors, administrators, and assigns: And the said demised "messuages, cottages, buildings, farms, lands, hereditaments, and premises," "so well and sufficiently repaired, amended, fenced, and kept, together with the possession of all the said demised premises," should and would "peaceably and quietly leave, surrender, and yield up unto the said R. L. Martyn, his heirs and assigns, at the expiration or sooner determination of the said term," accidents by fire, &c., only excepted: And also should and would (a) in a proper manner during the said term open-drain the coppices and underwoods of the said demised premises, and keep the same as free from water as possible, and should not nor would "cross-crop the said demised premises or any part thereof, nor commit any destruction, waste, damage, or spoil thereon, but" should and would, "in every instance not" in the said indenture "before specified, use, cultivate, and manage the said farms, lands, and premises, ingood husbandlike manner and according to the custom of the country." And the said R. L. Martyn, for himself, his heirs and assigns, did in and by the said indenture covenant, &c., with and to the said W. Elliott, his executors, administrators, and assigns, among other things, that he the said R. L. Martyn, his heirs and assigns, should and would "find and provide on the said demised premises sufficient rough timber (not on the stem) to enable the said W. Elliott, his executors, administrators, and *665] assigns, to *repair and put into repair the said messuages, buildings, and premises;" and "that, after the said messuages, buildings, farms, lands, hereditaments, and premises" had (b) "been put into good and sufficient tenantable repair by and at the expense of the said W. Elliott, his executors or administrators as aforesaid, he the said R. L. Martyn, his heirs and assigns, during the remainder of the said term of fourteen years," should and would, "from time to time, within one month after request made (such request being at a seasonable time of the year), find and provide sufficient rough timber (but not on the stem), and also bricks, tiles, and stones (but no other materials), on the said demised premises or within five miles thereof, for repairing the same, such materials to be fetched and carried by and at the expense of the said W. Elliott, his executors, administrators, and assigns, and to be used and employed in the repairs of the said premises and not elsewhere or otherwise." Then followed a covenant by Martyn that Elliott, his executors, &c., and assigns, should have the use of a messuage, &c., and of the barns, &c., there, until the 1st of May next after the end of the

(a) The deed itself introduced here some particular stipulations, not noticed in the declaration, as to the treatment of underwoods, pollards, &c., and the cultivation of the land in some other respects. See p. 682, post.

(b) In the deed, "after the said messuages," &c., "have been put," &c.

said term, to house and thresh out their corn, &c., without payment of rent, leaving the said messuage, &c., barns, &c., in tenantable repair, &c. Other stipulations followed, which need not be stated. As by the said indenture, &c., will more fully, &c.

Averment that, by virtue of the demise, Elliott, viz., on 31st December, 1836, entered and was possessed: and that, after the making of the indenture and during the term thereby granted, viz., on 20th October, 1846, all Elliott's estate, interest, term, &c., in the premises vested *in the defendant by assignment; whereupon defendant entered and became possessed, &c., and so continued until the expiration [*666 of the term, which term, and the 1st May then next, elapsed before the commencement of this suit and in the lifetime of Martyn. Nevertheless plaintiff further saith that, although the said R. L. Martyn from the time of the making of the said lease until the said assignment was ready and willing at all times to find and provide for the said W. Elliott, and, from the said assignment until the expiration of the said term, was ready and willing at all times to find and provide for defendant and the said W. Elliott, on the said demised premises, sufficient naked rough timber, and rough timber not on the stem, to enable Elliott and the defendant to repair and put into good and sufficient and tenantable repair all the said demised messuages, buildings, and premises, cottages, barns, &c., and other agricultural buildings, and the windows, walls, fences, gates, &c., and other enclosures of all and every part of the said demised premises; of which, &c. (notice to Elliott and defendant): and although the said W. Elliott did not, during the time which elapsed from the making of the said lease until the said assignment, or any part of the said last-mentioned time, or at any time, repair or put into good or sufficient tenantable repair the said last-mentioned demised premises or any part thereof, and although, &c. (general averment of performance by Martyn of all things on his part to be performed): Yet, &c.: Breach by non-payment of rent, not material here. Further breach: That defendant did not at any time after the said assignment to him repair or put into good or sufficient tenantable repair the said demised messuages, &c., or the said windows, walls, *&c., of all or any of the demised premises, nor did nor would surrender or yield up to [*667 Martyn at the expiration of the said term of fourteen years or on 1st May, &c., the said messuages, &c., well and sufficiently repaired; but defendant from the time of the said assignment until the expiration of the said term suffered and permitted the said demised messuages, cottages, &c., and premises, and every part thereof, to be, and the same during all the time last aforesaid were, ruinous, prostrate, fallen down, and in great decay for want of proper and necessary repairing and putting into good and sufficient tenantable repair, and not by reason of accidents by fire, &c.; and defendant, at the expiration of the said term of fourteen years, left all such part of the demised messuages, &c., and

premises as he had covenanted then to yield up, and at the expiration of 1st May then next left all such part, &c., as he had covenanted then to yield up, in repair as aforesaid, out of repair for want of being repaired, &c. Further breaches, That defendant did not open-drain, &c., and that he, after the making of the assignment, viz., on, &c., and on other days, &c., between that day and the expiration of the term, cross-cropped the demised lands and every part thereof, and also committed destruction, waste, damage, and spoil on the said demised premises: And that defendant, from the time of the making of the said assignment and from thence continually until the expiration of the said term of fourteen years, in all instances not in the said indenture particularly specified, used, cultivated, and managed the said demised farms, lands, and premises in a bad and unhusbandlike manner, and not according to the custom of the country. To the damage of plaintiff, as administratrix, of 1000*l.*, &c.

*668] *Pleas 1 & 2 (after demand of oyer, which was given) alleged matters which it is unnecessary to set forth, in answer to the averment of breach by non-payment of rent, and concluded with verifications, upon which issues in fact were taken.

Plea 3. As to so much of the second breach of covenant as charges defendant with not repairing the messuages, cottages, &c., or the windows, walls, fences, &c., and with suffering the messuages, &c., to be ruinous, &c., and with not leaving the premises, at the expiration of the term and on May 1st respectively, in repair according to his covenants: That, although Martyn was, after the time of the assignment to defendant, and more than one month before the committing by him of any of the breaches of covenant or causes of action in the introductory part of this plea mentioned, and before the expiration of the said term, viz., on 1st January, A. D. 1847, being a seasonable time in the year for that purpose, requested by defendant to find and provide for and to allow to defendant sufficient rough timber, and also bricks, tiles, and stones on the said demised premises or within five miles thereof for repairing the same, to be used and employed in the repairs of the said premises, and defendant was then and for one month thereafter, and from thence continually until the expiration of the said term, ready to fetch and carry away and dig at his own expense such rough timber, bricks, tiles, and stones, whereof Martyn, viz., on the day and year last aforesaid and always until the expiration of the said term, had notice; and although after such request by defendant more than one month elapsed before *669] the expiration of the said term *of fourteen years, and Martyn could and might and ought to have provided such timber within one month after such request as aforesaid according to his said covenant, yet Martyn did not nor would within one month after such request, or at any time during the said term or before the expiration thereof,

find or provide for or allow to the defendant such rough timber, bricks, tiles, and stones as aforesaid, or any rough timber, bricks, tiles, or stones. And defendant says that by reason of the premises he was prevented from performing so much of the said covenant in the said indenture mentioned as is referred to and comprehended in the introductory part of this plea, and necessarily and unavoidably suffered the said demised premises to be out of repair, and left the same out of repair, in manner and form, &c. Verification.

4. As to so much of the second breach as charges defendant with suffering and permitting the messuages, cottages, &c., to be ruinous, &c., during the time in that breach mentioned, &c., and with leaving those premises out of repair after the expiration of the term, and at the expiration of May 1st then next, contrary to his covenants, "so far as those causes of action are not covered or comprehended in or by the introductory part of the last-preceding plea:" that Martyn did not at any time from the time of the said assignment to defendant until the expiration of the said term find or provide on the said demised premises sufficient rough timber not on the stem, such as in the said indenture is mentioned, to enable defendant to put into repair the said demised messuages, buildings, and premises or any part thereof, or any rough timber whatever, in manner and form, &c. Conclusion to the country.

*5. Demurrer, "as to the residue of the said breach of covenant secondly above assigned, that is to say, as to so much of [670 the causes of action charged against the defendant in and by the said second breach as is not comprehended or covered or pleaded to by the introductory parts of the two several pleas next immediately preceding this plea respectively;" assigning for cause: that it is not sufficiently shown or particularly averred that naked rough timber not on the stem was provided or allowed by Martyn on any part of the demised premises to enable Elliott or the defendant to put the same into repair; and for that the covenant to put into repair was personal to Elliott, and not binding on defendant: and for that, although the premises are averred not to have been put into repair by Elliott, they may, consistently with the declaration, have been put into repair by some one to whom the same came by assignment before the assignment to defendant.(a) Joinder.

6 and 7. Pleas which led to issues of fact.

8. Demurrer, as to the breach lastly assigned, on the ground that the custom supposed to have been broken was not pointed out with sufficient certainty; and for other causes. Joinder.

The plaintiff demurred to pleas 8 and 4, stating several grounds. Those finally relied upon will appear sufficiently by the argument. Joinder.

(a) This last objection was not insisted upon in the argument.

The demurrers were now argued. (a) A question arising as to the right to begin, *C. Milward*, for the *defendant, relied upon *671] *Hilton v. Earl Granville*, 5 Q. B. 701, 710 (E. C. L. R. vol. 48). *Lush*, contra, cited *Williams v. Jarman*, 13 M. & W. 128,† S. C. 2 Dowl. & L. 212. *The Court* called upon

C. Milward, for the defendant.—As to the declaration. First: The defendant is not chargeable with the omission to “put into” repair, alleged as part of the second breach. The covenant to do this is confined to Elliott the original lessee, his executors and administrators. In the outset of the covenants his “executors, administrators, and assigns” are named; but here the assigns are omitted. It seems to have been intended that the repair should be done within a reasonable time; and the plaintiff does not show that the assignment took place before that time had elapsed. “If the lessee covenant to build a wall upon the premises, it shall not bind the assignee unless he be expressly named in the covenant, and though he be named, yet if the covenant were broken before the assignment, he shall not be bound;” Bull. N. P. 159; citing *Grescot v. Green*, 1 Salk. 199, and *Churchwardens of St. Saviour’s v. Smith*, 1 W. Bl. 351, S. C. 3 Burr. 1271. After the premises shall have been put in repair, Elliott again covenants for his assigns, as well as executors and administrators, to keep the premises in repair during the term.

Secondly, as to the breach of this last-mentioned covenant: it was a condition precedent to the necessity of performance that the plaintiff should have allowed timber and other materials; and the count should *672] have averred that this was done; *Thomas v. Cadwallader*, Willes, 496, and other authorities, cited in note (3) to *Peters v. Opie*, 2 Wms. Saund. 352, 6th ed. The materials to be found were the very substance with which the work was to be done. If *Thomas v. Cadwallader* differs from the present case, it is only in this, that the landlord here was to do something more than merely “finding, allowing, and assigning,” which were stipulated for in that case.

Thirdly, a breach is assigned by not yielding up the premises in good repair: but a covenant to do this does not bind the assignee. It does not run with the land: it is not a thing to be done upon the land during the term, but is altogether dehors the land. In *Doe dem. Strode v. Seaton*, 2 Cro. M. & R. 728, 730,† S. C. Tyr. & G. 19, Parke, B., says: “Who could have sued for a breach of this covenant, for not giving up possession at the end of the term? It was not a covenant running with the land, and therefore the heir could not sue:” and this dictum is referred to in the third edition of *Smith’s Lead. Ca.* vol. 1, p. 29, note on *Spencer’s Case*, 5 Rep. 16 a. The action is founded on privity

(a) Before Lord Campbell, C. J., Coleridge, Erie, and Crompton, Ja. The argument was begun on May 28th, but not concluded till June 1st, when Lord Campbell, C. J., Coleridge and Erie, Ja., were present: Crompton, J., was at Guildhall.

of contract, not of estate. [Lord CAMPBELL, C. J.—You say that it lies, not against the assignee for yielding up the premises unrepaired, but against the lessee for the assignee having so yielded them.] That is so. [CROMPTON, J.—The yielding up as required is to be “at” the expiration of the term, not “after.”]

Fourthly, the covenant last referred to, and the covenant to keep in repair, are to be performed “after” the premises shall have been put in repair to the plaintiff’s satisfaction, according to the preceding stipulation; but *that, as the declaration shows, has never been done. [*673 [Lord CAMPBELL, C. J.—According to your view, the assignee is neither bound to put the premises in repair nor to keep them repaired.] That may be so. The lessee, it may be presumed, was to put them into such a state at first that an assignee might easily keep them repaired. *Neale v. Ratcliff*, 15 Q. B. 916 (E. C. L. R. vol. 69), shows how essential this may be. [Lord CAMPBELL, C. J.—There the original repair was to be done by the lessor, and the action was against the lessees. You say that it makes no difference as to the liability of an assignee whether lessor or lessee was to do the first repairs.]

Fifthly, the breach alleging that the defendant cultivated and managed the lands “in a bad and unhusbandlike manner, and not according to the custom of the country,” is too vaguely stated. [Lord CAMPBELL, C. J.—I have drawn many declarations for bad husbandry without stating instances.] In Chitty Junr.’s *Precedents of Pleading*, 154, 2d ed., by Pearson, a direction is given for specifying instances. In *Earl of Falmouth v. Thomas*, 1 Cro. & M. 89,† S. C., 3 Tyr. 26, there cited, the Court of Exchequer was inclined to think that a breach in the general form was insufficient. The judgment of the same Court in *Angerstein v. Handson*, 1 Cro. M. & R. 789, S. C., 5 Tyr. 383, also sanctions the practice of alleging instances. [CROMPTON, J.—In *Earl of Falmouth v. Thomas*, the count was on an implied contract.] A breach may be too general though it follow the very words of the covenant; *Warn v. Bickford*, 7 Price, 550. Among other cases which show the proper mode of alleging a breach of promise to cultivate according to *the custom are *Lagh v. Hewitt*, 4 East, 154, *Hartley v. Burkitt*, [*674 4 New Ca. 687 (E. C. L. R. vol. 33), and *Hallifax v. Chambers*, 4 M. & W. 662.†

Lush, contra.—First: The lessee covenants generally for himself, his heirs, &c., and assigns, though, in stating who is to execute the particular covenant to repair, assigns are not named. But in a covenant to repair it is not necessary to mention assigns; they are liable at all events, the covenant to repair running with the land. [Lord CAMPBELL, C. J.—The covenant now in question is to put in repair.] That is immaterial. “Where the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with

the land, and shall bind the assignee although he be not bound by express words;" *Spencer's Case*, 5 Rep. 16 a. [COLERIDGE, J.—It is said here that the contract shows a purposed omission of assigns.] It is not of the essence of the covenant that one or another person is named to perform the covenant: it runs with the land, though the lessor furnishes the means of performing it. The duty is the same. It may have been intended that the person receiving the money should put the premises in repair at once; but that does not change the character of the obligation. Suppose the deed had said nothing of the allowance of 400*l.*, but it had been proved on a trial that the lessor had furnished that sum: would that have defeated an action against the assignee for not repairing? [ERLE, J.—To repair is not the same as to put in repair, which may require the building of something new. The ordinary repairing covenant *675] *is merely to maintain things in esse in the state they were in when the premises were demised. Lord CAMPBELL, C. J.—You need not here go so far as to say that repairing and putting into repair are the same thing. CROMPTON, J.—It is said in *Spencer's Case*, 5 Rep. 16 b, that, if the lessee covenants to build a new wall upon the place demised, it shall bind the assignee, being for his benefit, provided the covenant be express, for the lessee and his assigns.] It is contended on the other side that the term is not shown to have vested in the assignee before the time for putting in repair had elapsed. [CROMPTON, J.—If there was a limited time, you ought to have shown that the assignee came in before it expired.] In proof that might be necessary. But in *Churchwardens of St. Saviour's v. Smith*, 3 Burr. 1271, S. C. 1 W. Bl. 851, the action being against an assignee on a covenant to do repairs and build within seven years, the defendant pleaded that the estate did not come to him by assignment till after the seven years. [CROMPTON, J.—That does not show that the plaintiff ought not to have averred the contrary.] But the covenant in the present case is not limited to a time; and the breach is a continuing one. [CROMPTON, J.—From what time would the Statute of Limitations run?] The covenant is broken from day to day. Putting in repair and repairing were here practically the same thing; for, if the assignee found the premises unrepaired when he came in, he was bound to repair them. In *Neale v. Ratcliff*, 15 Q. B. 916 (E. C. L. R. vol. 69), the lessees covenanted to repair premises, the lessor first putting them in repair: that was an express condition precedent to be fulfilled by the lessor; here the assignee is sheltering himself under the default of *the lessee, his assignor. [Lord CAMPBELL, C. J.—It is to be supposed that he looked into the lease when he took the premises.] In *Payne v. Haine*, 16 M. & W. 541,† it was held that a tenant who engaged to keep premises in good repair was bound to put them into such repair if he found it wanting at the time of his taking possession; for, as Parke, B., said, "he cannot 'keep' them in good repair without putting them into it." [Lord CAMPBELL,

C. J.—That does not quite meet the argument that, in the present case, the premises were to be put into repair under a condition precedent.] By the covenants here the same person was to put and to keep in repair. The duty is one, though the covenants, as shown on the record, state it in an expanded form.

Secondly. The deed, as set out, did not make it a condition precedent to the repair that the lessor should find timber. The lessee was entitled to "rough timber," "not on the stem": he was not bound to ask for it; and the lessor was not obliged to cut his own timber when it might not be required. The repair and the cutting were to be contemporaneous. It is enough that the plaintiff avers readiness and willingness "at all times" "from the said assignment until the expiration of the said term." *Thomas v. Cadwallader*, Willes, 496, is a direct authority in the plaintiff's favour, the count here containing the averment of readiness which in that case was wanting. Where the contract is, on the one hand to sell and deliver goods at a certain price, and on the other to pay such price, the plaintiff, in an action for not delivering, must aver "that he was ready and willing to pay on delivery": note (3) to *Peeters v. Opie*, 2 Wms. Saund. 352 c, 6th ed.: but no more is necessary. *Poole v. Hill*, 6 M. & W. 885,† there cited in note (c), is to a like [*677 effect. [Lord CAMPBELL, C. J.—That was a stronger case for the plaintiff than this: there could hardly have been a conveyance till the purchaser had shown such a conveyance as he wanted.] In 2 *Chitty On Pleading*, 397, 7th ed., there is a precedent of a declaration for not repairing, with an averment that plaintiff allowed and provided timber according to stipulation in a lease that defendant should repair "being allowed timber," &c., "to be provided" by the plaintiff: but it is said in note (s), p. 399: "If the plaintiff was merely ready to find timber, let the allegation be accordingly, and aver notice of the plaintiff's readiness."

Thirdly: The covenant to repair and yield up in repair is an entire covenant; and the breach, as alleged, is one and entire; the breach by not yielding up in repair is not to be separated from the rest. But *Matures v. Westwood*, Cro. Eliz. 599, 617, expressly shows that a covenant to yield up in repair runs with the land.

The fourth objection is met by the answers which have been given to the first and third.

Fifthly: The breach in respect of husbandry is sufficiently assigned in the words of the covenant. And it is a rule of pleading that, where details would make the record unnecessarily prolix and expensive, the averment may be general; subject, of course, to delivery of a particular if required on summons. The opinion intimated by the Court of Exchequer in *Earl of Falmouth v. Thomas*, 1 Cro. & M. 89,† S. C. 3 Tyr. 26, is no authority for a more expanded form: there the plaintiff declared upon an implied assumpsit to cultivate in a husbandlike manner

and according to the custom of the country; and the defendant might be *entitled to know what obligation the plaintiff considered him *678] to incur by such undertaking and custom. *Legh v. Hewitt*, 4 East, 154, was not an action upon a covenant; and no question arose there as to the necessity of alleging specific instances. The same remarks apply to *Hartley v. Burkitt*, 4 New Ca. 687 (E. C. L. R. vol. 33), and *Hallifax v. Chambers*, 4 M. & W. 662.†

The 3d plea is bad, because it sets up the omission to find "sufficient rough timber, and also bricks, tiles, and stones," on the premises or within five miles, as an answer to the breach of covenant by not repairing the demised messuages, cottages, barns, &c., or other agricultural buildings, or the windows, walls, fences, &c. The gist of that complaint is the original neglect to repair; but the condition to find sufficient "rough timber," &c., applies to the subsequent repairing only. [Lord CAMPBELL, C. J.—All that is recited as breach in this plea seems to turn upon the not putting in repair.]

Plea 4, which professes to answer the breach by suffering the buildings to be out of repair, is substantially the same as that which was given up on the part of the defendant in *Thomas v. Cadwallader*, Willes, 496. It is no sufficient answer that the plaintiff did not actually find timber: if he was ready and willing to do so, he might insist upon the repair.

C. Millward, in reply.—As to the pleas: The breach answered by plea 3 is the neglect, not only to put in repair, but to keep in repair. [Lord CAMPBELL, C. J.—Would not it have been a good answer to that breach that you had put in complete repair?] That would not have met all the allegations. As to plea 4: the similar *plea in *679] *Thomas v. Cadwallader* was not abandoned. And there are material differences between the records in that case and in the present.

With respect to the declaration: *Spencer's Case*, 5 Rep. 16 a, is in favour of the defendant. The covenant to put in repair was a stipulation for "a thing to be newly made," and does not bind the assignee without express words. [Lord CAMPBELL, C. J.—Was not the performance of this a matter essentially connected with the enjoyment? On the construction of the agreement *Payne v. Haine*, 16 M. & W. 541,† seems to be an authority against you.] In construing covenants, the interests which parties take under the deed may properly be looked to as explaining the intention and determining the rights and liabilities; *Foley v. Addenbrooke*, 4 Q. B. 197 (E. C. L. R. vol. 45); *Keightley v. Watson*, 8 Exch. 716:† and here, the original lessee having in his hands so large a sum as 400*l.*, paid him by the landlord, it is reasonable to suppose that he separately, and not his assignee, was expected by the landlord to do the original repairs. [COLERIDGE, J.—The landlord would probably intend to have the security of both, when he paid so large a sum. Lord CAMPBELL, C. J.—According to your argument, the

lessee might pocket the 400*l.*, not doing the repairs, and assign his interest, and the landlord be without remedy against the assignee.] The declaration shows that the defendant did not enter till ten years after the entry of the original lessee, an interval far more than sufficient, it may be presumed, for putting these premises in repair. The dates are laid under a *videlicet*; but dates so pleaded are taken to be correct, when they are material; *Whitaker v. Harrold*, 11 Q. B. 163, 172 (E. C. L. R. vol. 63), *Ryalls v. The Queen*, 11 Q. B. 795, 798 (E. C. L. R. vol. 63), *Ryalls v. Bramall*, 1 Exch. 734, 738.† The [680] covenant to put in repair was to do a single act; continuous acts are provided for by the stipulations which follow. The averment of being ready and willing to furnish timber is clearly not sufficient to sustain the first breach, which regards a thing to be done at once. Without any request, the plaintiff must have been aware that he had to furnish timber for putting the premises into repair which was then wanted. This alone is sufficient to distinguish the present case from *Thomas v. Cadwallader*, Willes, 496. As to subsequent repairs, indeed, there was an independent covenant to supply the materials on request for repair of the buildings. In *Poole v. Hill*, 6 M. & W. 835,† the question was, who had to take the first step: the decision is consistent with the defendant's view, if, as he contends, a condition precedent lay upon the plaintiff. In *Matures v. Westwood*, Cro. Eliz. 599, 617, the point mentioned on the other side is said by Croke to have been decided by three Judges in opposition to Fenner, J. But this does not appear to have been the principal point debated: the case was more than once before the Court; and, in the report of the same case by Gouldsbrough, (a) only one Judge besides Fenner is mentioned as having been present when this question was finally discussed. [Lord CAMPBELL, C. J.—On most of the points I do not feel much difficulty; but we will take time to consider them.] *Cur. adv. vult.*

Lord CAMPBELL, C. J., in the ensuing vacation (June 18th), delivered the judgment of the Court.

*In this case we have considered the points relied on for the defendant, and have come to the conclusion that they are not [681] supported, and that the plaintiff is entitled to our judgment.

With respect to putting the premises in repair, and to delivering them up in repair, we think that each of these stipulations comes within the class of covenants that run with the land, and that they are continuing covenants to the end of the term. The covenant to put in repair is a matter to be done upon the thing demised as much as the repairing. The covenant to leave in repair at the expiration of the term is broken during the term if, at the instant of leaving, the premises are out of repair. The payment of money by the lessor to the lessee for the purpose of putting in repair affords no ground for inferring that the lessor

(a) Gouldsb. 175.

intended to forego any usual security for the performance of that covenant, and no reason for exempting the assignee of the lessee from the usual liability; but on the contrary was notice to him to require the application of that money unless he intended to be himself responsible to the lessor.

With respect to the averment of readiness and willingness to find rough timber, we think it a sufficient performance of the condition precedent relating thereto. It would be unreasonable to require that the timber should be cut before the lessee or his assignee required it for the purpose of using it in repairs. The declaration therefore is right in this respect; and the plea alleging that timber was not found is bad.

The remaining objection was founded on the generality of the breach of the covenant for the cultivating the land in a good husbandlike manner and according to the custom of the country. No authority was *682] cited to show that an allegation of the breach, following the words of the covenant, was insufficient; and we find no principle for so holding. The defendant must be taken to have understood the application of the covenant he chose to make; and, if there was real difficulty in defending by reason of the generality, the remedy would be by applying for an order for particulars. The separate covenants for specific acts of cultivation do not appear in any degree to be irreconcilable with the custom of the country.

We also think that the plea alleging that materials were not found by the lessor, as stipulated in respect of the lessee's covenant for keeping in repair after the premises had been put in repair, is bad because it does not apply to the breach assigned in the declaration to which it is pleaded. This breach is in respect of not putting the premises in repair; and the condition for providing the materials mentioned in the plea applies only to the future repairs after the premises have been put in repair.

Judgment for the plaintiff.

A covenant by a tenant to occupy, to pull down old chimneys and put up and leave the premises in tenantable new ones, is a covenant running with repair at the expiration of the term, the land, and binds the assignee of the runs with the land: *Shelby v. Hearne*, lessee though not named: *Harris v. 6 Yerger*, 512. A covenant, in a lease, *Coulbourn*, 3 *Harrington*, 338.

The QUEEN v. STREET and Others. *May 29.*

The overseers of a parish, at a vestry meeting held for the purpose, assessed a railway Company at 2708*l*. The Company gave notice of appeal. At a subsequent vestry it was decided that the assessment should be reduced to 2000*l*., and that, if the Company refused that compromise, the overseers should take such proceedings as they might be advised were necessary. The Company appealed: and the then overseers, without calling a vestry meeting, contested the appeal. The Sessions reduced the rate to 300*l*., subject to a case for the Queen's Bench. The case was not sent up, the overseers having arranged with the Company that the rate should be fixed at 450*l*. The Poor Law Auditor disallowed the expenses of contesting the appeal, on two grounds: 1. That the overseers should have called a vestry meeting to determine whether the appeal should be contested; 2. That they should, after the decision at Sessions, have summoned a vestry to determine whether the case for the Queen's Bench should be proceeded on. The expenses in question were, after the audit, sanctioned by the inhabitants at a vestry meeting.

Held, that the overseers were not bound to summon a vestry meeting before contesting the appeal or abandoning the case reserved; and that, as the auditor did not allege that what they had done was inexpedient or that they had acted *malà fide*, the grounds of disallowance were bad.

POULDEN, in last Easter term, obtained a rule calling on the auditor of the Poor Law Union which comprises the parish of Ringwood, in the county *of Southampton, to show cause why the disallowance by him of 88*l*. in the account of the overseers of the said parish [*683] should not be quashed.(a)

It appeared by the affidavits that in July, 1847, a vestry meeting was held for the purpose of fixing the amount at which The London and Dorchester Railway Company should be assessed to the poor-rate of the parish, disputes having arisen between the parish and the Company upon that point; and it was then unanimously agreed that the railway should be assessed at 2708*l*. In December, 1847, application was made to the Poor Law Commissioners, on behalf of the parish, for information as to the proper mode of such assessment; but the Commissioners stated that an appeal at Quarter Sessions was the only method of settling the rate. The Company gave notice of appeal against the assessment; and, at a vestry meeting held on 24th December, 1847, it was unanimously agreed that the assessment should be reduced to 2000*l*., and, that, if the Company refused to compromise on those terms, the overseers should take such proceedings as they might be advised were necessary. The Company appealed against the reduced assessment, which was made, in 1848, by the overseers whose account contained the item disallowed by the auditor. The overseers did not summon a vestry meeting to decide whether the appeal should be contested or not, but proceeded to contest it on their own responsibility. The Sessions reduced the assessment to 300*l*., subject to the opinion of the Court of Queen's *Bench on a case; but the case was not sent up, an [*684] arrangement having been made between the parish and the Company that the rate should be fixed at 450*l*. At an audit held in June, 1849, the sum of 88*l*., being the expenses incurred by the overseers in

(a) See stat. 7 & 8 Vict. c. 101, s. 35.

contesting the appeal, was disallowed by the auditor upon the two following grounds: first, that the overseers ought, before incurring such expenses, to have summoned a vestry meeting to consider the propriety of their so doing; and, secondly, that, after the decision at Sessions, the overseers ought to have summoned a vestry meeting to consider the propriety of going on with the case reserved, and the amount at which the Company should be assessed for the future. After the audit, a vestry meeting was held, at which the expenses in question were approved of by the rate payers present.

Collier now showed cause.—The auditor was right in disallowing this item. Where the expense of contesting an appeal is so large, a vestry should be summoned to decide upon the propriety of incurring it. If the overseers choose to contest the rate upon their own responsibility, they cannot charge the parish with the expense; *Regina v. Fouch*, 2 Q. B. 308 (E. C. L. R. vol. 42), *Regina v. Great Western Railway Company*, 13 Q. B. 327 (E. C. L. R. vol. 66). Further, the appeal having been contested, the overseers were bound to take the opinion of the rate payers, whether the case reserved by the Sessions should come before the Court of Queen's Bench: that Court might possibly have reduced the rate below the amount which was arrived at by arrangement.

*685] In *Willcock's Poor Law*, p. 281, cited by Taunton, J., in *Rex v. Gwyer*, 2 A. & E. 216, 226 (E. C. L. R. vol. 29), it is laid down that overseers are entitled to charge in their accounts the costs "of an appeal, though decided against them, unless they have been guilty of gross misconduct, or of neglecting to consult the vestry as to the propriety of proceeding in it when there was convenient opportunity." That exception exists here.

Poulden, contra, was not called on.

COLERIDGE, J.—In deciding this case we ought to look only at the grounds upon which the auditor disallowed the item in question. The first is, that, before incurring this litigation, the overseers ought to have taken the opinion of the inhabitants, at a vestry meeting, as to the propriety of incurring it. The auditor does not state, or suggest, that the litigation itself was illegal or inexpedient; and therefore the question is simply whether the overseers are bound to obtain the sanction of a vestry meeting before they proceed to defend a rate; and, if they do not take that step, whether they are to be allowed the costs of the defence, however properly it may have been taken up. I find no case which lays down such a principle; nor is the principle a reasonable one. I do not say that taking the opinion of the inhabitants would not be, in many cases, a very proper step: but it is not always necessary. Here the question had been fully discussed before the application to the Poor Law Commissioners, and again, at another vestry meeting, before sending the case to the proper tribunal, the Quarter Sessions. Under

these circumstances, the *summoning a vestry meeting would have been a mere formal proceeding. The second ground is, [*686 that the overseers ought to have let the case reserved be decided by the Court of Queen's Bench, or have summoned a vestry meeting to determine whether or not the litigation should be abandoned. I see nothing to warrant this objection. The Sessions find against the parish, subject to the opinion of this Court. The overseers prefer, before taking that opinion, to try what can be done by negotiation; and the rate is ultimately fixed at a larger amount than that given by the Sessions. That is no abandonment of the rate; nor is it suggested that there was mala fides on the part of the parish officers: and the mere fact of their not having taken the opinion of the inhabitants before making the arrangement with the Company is no valid ground of objection. The cases which have been cited are not in point. In *Rex v. Gwyer*, 2 A. & E. 216 (E. C. L. R. vol. 29), the decision was upon a different point altogether; and in *Regina v. Great Western Railway Company*, 13 Q. B. 327 (E. C. L. R. vol. 66), the proceedings by the parish officers were originally illegal.

CROMPTON, J., concurred.(a)

Rule absolute.

(a) Lord Campbell, C. J., and Erle, J., were at the Criminal Court of appeal.

***The QUEEN v. The Overseers of the Township of SAL-** [*687
FORD. May 29.

The resident holder and occupier of a house annually rated at above 15*l.*, in a town corporate with a population of more than 5000, called upon the overseers for certificates to enable him to apply, under stat. 3 & 4 Vict. c. 61, for a license to sell beer by retail. The overseers gave him a certificate of the amount at which the house was rated, and attached their certificate, as directed by stat. 4 & 5 W. 4, c. 85, to the certificate of character produced by him; but refused to certify that he was the resident holder and occupier of the house. The Board of Inland Revenue, being satisfied, on inquiry, that he was the resident owner and occupier, directed their officers to grant a license.

Held, on motion to quash the license, which had been brought up by certiorari, that the granting of the license was not a judicial act capable of revision by the Court on certiorari. *Scilicet* that the proper mode of trying its validity was to treat it as void.

PASHLEY, in last Easter Term, obtained a rule calling on the collector and supervisor of Excise for the district of Manchester, in the county of Lancaster, to show cause why a license (brought up by certiorari), under their hands and seals, authorizing Thomas Hague to sell beer, &c., by retail as specified therein, should not be quashed.

From the affidavits it appeared that Hague, on 3d July, 1851, became the resident holder and occupier of a house in the township of Salford, which is within the excise district of Manchester. The house was at that time assessed to the poor-rate at 12*l.* 10*s.* Hague, being desirous to obtain a license to sell beer by retail, applied to the overseers

of Salford in order that the house might be reassessed; and it was accordingly assessed at 16*l.* 5*s.* The township of Salford contains more than 10,000 inhabitants.^(a) In November, 1851, Hague paid half a year's poor-rate, and afterwards applied to the overseers for a certificate of his being the resident holder and occupier, and of the annual *688] rent at which the house was assessed;^(b) *and produced the requisite certificate of character signed by six inhabitants of Salford.^(c) The assistant overseer subscribed at the foot of this document his own certificate as to the parties signing, and also signed and gave to Hague a certificate that the house in question was assessed to the poor-rate at 16*l.* 5*s.*; but the overseers refused to certify that Hague was the resident holder and occupier, or to give their reasons for refusing. Hague addressed a memorial to the Board of Inland Revenue; and the Board, after inquiry, being satisfied that Hague was the resident holder and occupier, directed their officers to grant him a license. The license was in the form given in the schedule to stat. 4 & 5 W. 4, c. 85, except that it did not recite that a certificate of character had been deposited.

Sir *F. Thesiger*, Attorney-General (with whom were Sir *Fitzroy Kelly*, Solicitor-General, *Watson* and *Welsby*), now showed cause.—First, the sufficiency of the license cannot be reviewed upon certiorari. The functions exercised by the Board of Inland Revenue in granting licenses are ministerial, not judicial; and the character of those functions is not altered, in the present case, by the Commissioners having previously done a quasi-judicial act in dispensing with the certificate of occupancy. A beer license cannot be quashed upon certiorari any more than a game certificate; the proper mode of questioning the sufficiency of either would be to treat it at once as void. Next, two objections are taken to the license here: first, that it does not follow the form provided by the statute, as it does not recite that the person to whom it is granted *689] *has deposited a certificate of character; secondly, that the Board of Inland Revenue has no power to grant a license, where the overseers refuse to give the party applying for it the certificates required by the statute. As to the first objection, stat. 4 & 5 W. 4, c. 85, s. 21, provides that a certificate of character shall not be required as to any house within any town corporate of which the population exceeds five thousand; and it appears by the affidavits that the population of Salford is 10,000. The license, moreover, is good upon the face of it, and is therefore not open to this objection, unless it shows that the population is below five thousand. As to the second objection, it is clear that the Legislature meant to vest the controlling power with respect to beer licenses in the Board of Inland Revenue, not in the overseers. (He was then stopped by the Court.)

(a) See stat. 3 & 4 Vict. c. 61, s. 1.

(b) See stat. 3 & 4 Vict. c. 61, s. 2.

(c) See stat. 4 & 5 W. 4, c. 85, s. 2.

Pashley and R. Hall, contra.—The overseers have a discretionary power as to granting the requisite certificates for a license; *Regina v. Kensington*, 12 Q. B. 654 (E. C. L. R. vol. 64); and the Board of Inland Revenue, by dispensing with the certificate of occupancy, have, in fact, reversed the decision of the overseers, and have committed an excess of judicial authority. The proper mode, therefore, of reviewing their proceedings is to bring them up by certiorari. [COLERIDGE, J.—The license is granted by the collector and supervisor. Their functions can hardly be considered as judicial.] They represent the Board of Inland Revenue; and what is done by them must be considered as the act of the Board. In *Regina v. Aberdare Canal Company*, 14 Q. B. 854 (E. C. L. R. vol. 68), it was held that, where *Commissioners, appointed by statute, had a discretionary power to give [*690 their consent to the erection of bridges over a canal at the cost of the landowners, such consent was a judicial act which could be reviewed upon bringing up the official entry of it by certiorari. In *Regina v. Arkwright*, 12 Q. B. 960 (E. C. L. R. vol. 64), an order of the Church-Building Commissioners for stopping a path through a churchyard was brought up on certiorari, and quashed for informality. And in *Regina v. Coles*, 8 Q. B. 75 (E. C. L. R. vol. 55), an order of Quarter Sessions with respect to the fees of the clerk of the peace was held to be a judicial proceeding, removable by certiorari. The granting of this license by the Board of Inland Revenue is as much a judicial act as the acts reviewed upon certiorari in these cases, or as the apportionment of a county rate, which is capable of being reviewed in like manner.(a)

COLERIDGE, J.—This rule must be discharged. We are not called upon to determine the nature of the power vested in overseers with respect to granting the certificates requisite for a license. They may have a judicial authority which is incapable of being controlled or contradicted by the Board of Inland Revenue; and the question whether they have or not may be worthy of investigation. But the question here is, whether the grant of the license is, in itself, a judicial act over which this Court can exercise a control. It is argued that the license really proceeds from the Board of Inland Revenue, and that the functions of the Board are of a judicial character. Now it *is true [*691 that in cases of difficulty the inferior officers would very properly act, as here, upon instructions from the Board; but that does not affect the character of the particular act, the granting of the license, which is all that we can look at. I do not think that act is a judicial one. The license itself may be void for not complying with the provisions of the statutes; and the question of its validity may be raised by treating it as void: but to hold that the act of the officer of the Board, in granting the license, is sufficiently judicial in its character to allow

(a) The Court having decided on the preliminary question, the points arising as to the certificate itself were not further discussed.

of its being brought here by certiorari would be a very unreasonable doctrine, and would lead to many incongruities and inconveniences. The instances which have been suggested in support of the rule are all instances in which a judicial authority is exercised. Thus, in the apportionment of a county rate, the functionaries by whom the apportionment is made have to determine, not only whether the particular property is liable to be rated, but the proportions in which the rate must be equally distributed through the parish; and, in the case of an order by the Church-Building Commissioners to stop up paths through a churchyard, the proceeding is based upon a decision, which is clearly judicial in its nature, as to the expediency of such a step. I think that the grant of a license to sell beer by retail is not judicial; and that therefore it is not an act upon the validity of which this Court can decide upon certiorari.

CROMPTON, J., concurred.(a)

Rule discharged.

(a) Lord Campbell, C. J., and Erle, J., were at the Criminal Court of appeal.

*692] *Ex parte SIR CHARLES JAMES NAPIER. May 31.

An officer commanding forces of Her Majesty and The East India Company, in India, has no such legal right, by statute or otherwise, to his pay, as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus calling upon the Company to discharge arrears; though he has always received his pay from the Company, and their practice has been to discharge it monthly.

BYLES, Serjt., moved (a) for a mandamus calling upon The East India Company to pay to Lieutenant-General Sir Charles James Napier the sum of 28,198 rupees 14 annas and 8 pice, under the following circumstances, alleged on affidavit.

In 1843, Sir C. J. Napier commanded certain land forces of Her Majesty and of The East India Company, then serving in Scinde in the East Indies. In that year, the said forces captured from the enemy certain booty and prize of war, which, by Royal warrant dated 11th November, 1845, was intrusted to The East India Company to be distributed as prize-money, in proportions therein pointed out, among the officers and soldiers of the capturing force.(b) Under this warrant Sir C. J. Napier received, in 1848 and 1849, and (as he deposed) believed himself entitled to, sums of money amounting to 68,000*l.* sterling.

(a) Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

(b) The warrant directed: "That, in case any doubt shall arise respecting the claims to share in the distribution aforesaid, or respecting any demand upon the said captured booty or plunder, the same shall be determined by the directors of the East India Company or by such person or persons to whom they shall refer the same: which determination thereupon made shall with all convenient speed be notified in writing to the Commissioners of our Treasury; and the same shall be final and conclusive to all intents and purposes, unless, within three months after the receipt thereof at the office of the Commissioners of our Treasury, we shall be graciously pleased otherwise to order."

By commission under Her Majesty's sign manual, dated 13th March, 1849, Sir C. J. Napier was appointed commander-in-chief of Her Majesty's forces then serving *in the territorial possessions of The East India Company, during Her Majesty's pleasure: and by [*693 like Royal commission of the same date he was appointed to the local rank of general in the army in the East Indies from 6th March, 1849. And by another commission under the common seal of The East India Company, dated 19th March, 1849, he was appointed commander-in-chief of all the Company's military forces employed, or which might thereafter be employed, in the East Indies, with certain exceptions. He was also appointed by the Company an extraordinary member of the council of India. The commissions and appointment remained in force in and after October and November, 1850.

Sir C. J. Napier arrived in India on May 6th, 1849, and performed the duties imposed by the said commissions and appointment from thence till December, 1850, when he resigned the said offices. The pay of the forces serving in India has been and is payable and paid by the Company; and, during the period last mentioned, the proper salary of Sir C. J. Napier as commander-in-chief under the said commissions was 14,305 rupees, 7 a. 7 p. (equivalent to 1430l. 11s. sterling) per calendar month, and was payable monthly, about the third day of each month for the month preceding, according to the usual practice, to Sir C. J. Napier. The salary was duly paid down to and including the month of April, 1850: but in May and June of that year, respectively, the Company objected to pay the full sum, and claimed to deduct, and did at first deduct, 3366 rupees, 7 a. 7 p. per month, alleging as a reason that a larger sum had been shared among the capturing army for prize-money than ought to have been distributed, and that the Company were entitled to deduct Sir C. J. Napier's share of *the over payments by [*694 monthly instalments out of his pay, till the whole alleged excess, amounting to 20,198 rupees, 14 a. 8 p., should have been deducted. Sir C. J. Napier protested against this claim; and, in consequence, the deducted sums were paid over to him, and the full monthly salary was received by him down to September, inclusive. But, in paying the October and November salary, the Company again claimed to deduct for the alleged over payments of prize-money; and they accordingly stopped and refused to pay the whole of the October salary and a portion of that for November, the whole deduction amounting to 20,198 rupees, 14 a. 8 p., equivalent to 2019l. 17s. 6d. sterling, which the Company (as Sir C. J. Napier's affidavit stated) were bound to pay him and had no colour of right to withhold.

Payment was demanded of the Company, and refused, on the ground that the sum named had originally been issued to Sir C. J. Napier in error on account of his share of the Scinde prize-money, and had been deducted by the Government of India on adjusting the account.

Byles, Serjt., contended that, under these circumstances, Sir C. J. Napier had a legal right to the sum withheld, but could not recover it by action; and therefore that a mandamus lay, and ought to be granted. The arguments used and authorities cited will appear sufficiently by the judgment of the Court. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a subsequent day of the term (June 5th), delivered judgment.

This was a motion for a rule to show cause why a mandamus should *695] not issue directed to The East India Company, commanding them to pay Lieutenant-General Sir Charles Napier the sum of 20,198 rupees. He alleges that this is the amount of an improper deduction from the pay due to him as commander of the Queen's forces in India, and as commander of the forces of The East India Company, in the months of October and November, 1850; but he seeks to recover it as the arrears of such pay.

The first question to be considered is, whether, if his pay had been withheld from him without any reason being assigned, there is any jurisdiction in this Court to order by mandamus the arrears which he claims to be paid to him by The East India Company. If there be not, we cannot entertain the question whether The East India Company were justified in making the deduction.

The applicant must make out that there is a legal obligation on The East India Company to pay him the sum he demands, and that he has no remedy to recover it by action. The latter point becomes material only when the former has been established; for the existence of a legal right or obligation is the foundation of every writ of mandamus. But it seems to us that the attempt to show that there was any obligation on The East India Company, which the law will enforce, to pay any sum of money to Sir Charles Napier, either as commander of the Queen's forces or as commander of the native troops, has entirely failed. A legal obligation, which is the proper *substratum* of a mandamus, can only arise from common law, from statute, or from contract. Of course the obligation here contended for cannot arise from the common law, and is not rested on contract. We have therefore to see whether there be any enactment of the Legislature by which it can be supported. *696] It was not contended that an officer in the Queen's army at home could apply to us for a mandamus on the ground that his pay is improperly withheld from him; and the application is entirely founded on certain statutes respecting The East India Company and the government of the dominions belonging to the Crown in India. We will examine these statutes in chronological order.

The first relied upon is stat. 33 G. 3, c. 52, "For continuing in The East India Company" "the possession of the British territories in India" and "for establishing further regulations for the government of the said territories." By sect. 128 of that statute it is enacted that all sums

issued by the paymaster-general of His Majesty's forces for and on account of His Majesty's forces serving in India shall be repaid by the said Company, and that the actual expenses which have been or which hereafter shall be incurred for the support or maintenance of the said troops shall be borne and paid by the said Company. But this is an arrangement between The East India Company and the British Government, and establishes no privity between the Company and any officer whatever.

Then comes stat. 53 G. 3, c. 155, by which in common language the *charter of the East India Company was renewed*; and which enacts (sect. 55) that the revenues of the Company shall be applied, "in the first place, in defraying all the charges and expenses of raising and maintaining the forces, as well European as native, military, artillery, and marine, on the establishments in the East Indies." Still this appropriates no part of these revenues in particular to the commander-in-chief of the forces.

*Next, we have an Indian Mutiny Act, 4 G. 4, c. 81. This [697 enumerates a great number of offences for which military men may be tried by court martial in the East Indies; and, by sects. 43 and 44, enacts that no paymaster shall receive fees, or make any deductions, out of the pay or allowance which shall be due to any officer or soldier in the Company's army, other than usual deductions; and that, if any officer or paymaster shall unlawfully detain or withhold for the space of one month the pay and allowances of any officer after such pay and allowances have been received, then, upon proof thereof before a court martial, every such paymaster or officer so offending shall be discharged from his employment, and shall forfeit 800 sicca rupees: provided that it shall be lawful for the Governor-general in council to give orders for withholding the pay of any officer for any period during which such officer shall be absent without leave. But as yet no amount of pay is assigned to the commander-in-chief or any officer; and no directions are given to the Government to issue the pay or allowances; and no time is mentioned when any pay or allowances shall become due.

We were then referred to stat. 3 & 4 W. 4, c. 85, under which India is now governed, and will continue to be governed till the 30th of April, 1854. By sect. 79 of this statute it is enacted that the return to Europe of any governor-general or commander-in-chief shall be deemed a resignation of his office, and that the salary and other allowances of any such governor-general or other officer shall cease from the day of such his departure or resignation. This certainly supposes that the commander-in-chief is entitled to some pay and allowances till his departure or resignation, but is entirely *silent as to what shall [698 be the amount, or by whom, or when it is payable.

Nor is the applicant's case at all advanced by the statute which he next quotes, 7 W. & 1 Vict. c. 47, "To repeal the prohibition of the

payment of the salaries and allowances of The East India Company's officers during their absence from their respective stations in India." This act provides (a) that the prohibition of the payment of salaries to officers in the service of The East India Company during their absence from India shall not extend to cases of sickness, and (b) that the Court of Directors shall have power to order the refunding of any part of the salary or allowance received by any officer or servant of the Company, and that the sum so to be refunded shall be a debt due to and recoverable by the Company; without giving any officer any right which he did not before possess.

Chief reliance however was placed on stat. 3 & 4 Vict. c. 37, s. 35, which was asserted to be a statutable recognition of the right of the commander-in-chief to be paid his salary by the Company, without any deduction. But the statute when examined turns out to be merely a new edition of the India Mutiny Act; and sect. 35 is no more than a repetition and consolidation of sects. 43 and 44 of stat. 4 G. 4, c. 81. It therefore merely renders a paymaster liable to be tried by a court martial for receiving fees or making improper deductions, or detaining in his hands pay or allowances more than a month after he has received them.

The statutory obligation upon the Company to pay the salaries claimed is in no degree established. Sir Charles Napier in his affidavit *699] says that "the pay of the *forces serving in India has been and is payable and paid by the said Company; and that, during the period of his filling the said offices as aforesaid, the proper pay or salary of him this deponent as commander-in-chief, under the said commissions from Her Majesty and the Honourable The East India Company, was, in Company's rupees, the sum of 14,305 rupees 7 anas and 7 pice per calendar month, which is equivalent to 1430l. 11s. sterling, and was payable monthly on or about the 3d day of each month for the next preceding month, *according to the usual practice*, to this deponent by the Honourable The East India Company." He thus relies merely on *practice*, which may amount to an honourable but does not to a legal obligation.

We will now examine the authorities quoted by the learned counsel who made the motion. He began with *Gibson v. East India Company*, 5 New Ca. 262 (E. C. L. R. vol. 35), (c) in which the Court of Common Pleas held that the retiring pension of a military officer of The East India Company does not upon his bankruptcy pass to his assignees. But this was with a view to prove (which it does very conclusively) that no action would lie for the arrears in question at the suit of Sir Charles Napier against The East India Company; and it has no tendency to

(a) Sect. 1.

(b) Sect. 3.

(c) *Gidley v. Lord Palmerston*, 3 Brod. & B. 275 (E. C. L. R. vol. 7), was also cited.

show the legal obligation. Tindal, C. J., says: (a) "It is clear that no action could be supported against any one to recover the arrears of half-pay granted by the Crown, at least unless the money has been specifically appropriated by the Government, and placed in the hands of the paymaster *or agent to the account of the particular officer; and there is no ground upon general principle to hold [*700 that an action could be maintained against any one, unless under the same circumstances, in the present case." "Many grounds of inexpediency in allowing a claim of the present description to be recoverable in a Court of law readily suggest themselves. If the retired pension which is given for former services can be recovered by action, why should not the pay and allowances for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended and kept in arrear beyond the day when it becomes due, and until the service, in respect of which it is earned, has been entirely completed? Not to mention the expense and inconvenience which must arise if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service." "The grant in question" "appears to us to range itself under that class of obligations which is described by jurists as *imperfect* obligations; obligations which want the 'vinculum juris,' although binding in moral equity and conscience; to be a grant which The East India Company, as governors, are bound in foro conscientiæ to make good, but of which the performance is to be sought for by petition, memorial, or remonstrance, not by action in a Court of law." These observations seem to us to be equally applicable to the full salary of a commander-in-chief as to the half-pay of a lieutenant-colonel, and not only to an action, but to a proceeding in a Court of law by mandamus.

*We have been also referred to *Rex v. The Directors of The East India Company*, 4 B. & Ad. 530 (E. C. L. R. vol. 24), [*701 where a mandamus was actually granted against them, ordering them to transmit to India a despatch on the "Political Department," as altered by the Board of Control: but this was under an Act of Parliament, 33 G. 3, c. 52, s. 12, which expressly imposed upon the directors the legal obligation to do so.

Reliance is then placed on the case of *Rex v. Lords of the Treasury*, 4 A. & E. 286 (E. C. L. R. vol. 31), in which this Court granted a mandamus to the Lords of the Treasury to pay to Mr. Carmichael Smyth the arrears of a pension granted by the Crown for services: but (as has been repeatedly explained (b)) this decision went entirely on the

(a) 5 New Ca. 274, 275.

(b) See *Regina v. Lords of Treasury, In re Smyth*, 4 A. & E. 976 (E. C. L. R. vol. 31); *Regina v. Same, In re Hand*, 4 A. & E. 984, *Regina v. Commissioners of Woods and Forests*, 15 Q. B. 761, 772 (E. C. L. R. vol. 69).

ground that the Lords of the Treasury had admitted that they had in their hands the sum of money in question, and that they had appropriated it to his use.

The last case cited was *Regina v. Lords of the Treasury, In re The Queen Dowager's Annuity*, 16 Q. B. 357 (E. C. L. R. vol. 71), in which this Court intimated an opinion that, if the arrears of the annuity claimed had been due, mandamus would have been the proper remedy to recover them. But the ground was, that, if the right existed, it was a legal right, and there was no mode of enforcing it except by this prerogative writ; for the annuity was charged on the consolidated fund; and the statute 4 & 5 W. 4, c. 15, s. 13, enacted that the payment of such an annuity can only be obtained by the warrant of the Lords of the Treasury, and had imposed upon them the duty of *granting
*702] the warrant when payment of the annuity becomes due.

Thus, upon a full examination of the statutes and decisions relied upon, it is quite manifest that the distinguished officer who now seeks redress by a writ of mandamus has mistaken his course: and therefore the rule to show cause for which he has applied cannot be granted.

Rule refused.

The Trustees of the BIRKENHEAD DOCKS, Appellants, v. The Overseers of the Poor of the Township of BIRKENHEAD. *June 3.*

Reported, 2 E. & B. 148 (E. C. L. R. vol. 75).

*708] *The QUEEN v. SAVILE. *June 3.*

Under stat. 4 & 5 W. & M. c. 18, s. 2, a defendant in a criminal information which is not tried, or in which a verdict is given for the defendant, is entitled only to such an amount of costs as equals the amount of the prosecutor's recognisance.

Semble, That the proper mode of obtaining such costs is for the defendant to take out a side bar rule for taxing the whole costs; and, upon that being done, he is entitled to so much of them as equals the amount of the recognisance.

MONTAGUE SMITH, in last Easter Term, obtained a rule calling on the prosecutor to show cause why he should not pay to the defendant his costs in this prosecution.

A rule for a criminal information against the defendant had been obtained at the instance of the prosecutor, who entered into recognisance in 20*l.* to prosecute. The case was tried before Erle, J., and a special jury, at the last Devon Spring Assizes; and a verdict was found for the defendant. The learned Judge certified that the case was one proper to be tried by a special jury, and refused to certify that there was reasonable cause for exhibiting the information.

Collier now showed cause.—The defendant is entitled only to a sum equal to the amount of the prosecutor's recognisance; *Rex v. Filewood*, 2 T. R. 145. This rule is unnecessary for that purpose. The proper course is to take out a side bar rule to tax: that being done, the defendant may claim such an amount of costs as equals that of the recognisance.

Montague Smith, *contra*.—The costs may be taxed out of Court; but the Court itself must decide whether or not costs are to be allowed at all. [COLERIDGE, J.—The *Court does, in effect, decide that, [*704 by granting a side bar rule as has been suggested. In *Rex v. Woodfall*, 2 Stra. 1131, it was held that the awarding of costs to the defendant is compulsory upon the Court, where the Judge has refused to certify that there was reasonable cause for exhibiting the information.] The condition of the recognisance, as provided by stat. 4 & 5 W. & M. c. 18, s. 2, is that the prosecutor shall effectually prosecute the information, "and abide by and observe such orders as the said Court shall direct." And the section contains a separate provision that the Court "is hereby authorized to award to the said defendant" his costs. This clearly shows a discretion in the Court in the matter of costs. [Lord CAMPBELL, C. J.—That argument was used in *Rex v. Filewood*; but it was there held that a defendant is not, under that section, entitled to more costs than the amount of the prosecutor's recognisance. I see no reason for departing from the usual practice.]

Per Curiam.(a)

Rule discharged on payment of 20*l.* within one month.

(a) Lord Campbell, C. J., Coleridge, Wightman, and Erle, J.

*The QUEEN *v.* The Company of Proprietors of the EAST LONDON WATERWORKS. *June 5.* [*705]

Paving Commissioners, appointed under a local Act, 11 G. 3, c. 12, were empowered, by sect. 5d, to make rates upon all persons who "shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments within any of the said streets, squares," &c., of a certain district; such rate not to exceed 1*l.* 2*d.* in the pound of the yearly rents or value of such of the said lands, houses, &c., situate in any of the said streets, squares, &c., the greater part of which should be paved in a certain manner, and not to exceed 9*d.* or 6*d.* in the pound, respectively, for such of the said lands, houses, &c., situate, &c., the greater part of which should be paved in a certain other manner, or only repaired under the Act. Different assessments were provided for public buildings, dead walls, and vacant ground adjoining the said streets, squares, &c., and for unoccupied houses. No specific assessment was provided for water pipes laid down in the district. The Commissioners, in whom the paving materials of the said streets, squares, &c., were expressly vested by the Act, were empowered to alter the position of the pipes belonging to any water or gas company, underneath such streets, squares, &c.

led, that an incorporated water Company, whose mains, pipes, and other apparatus were laid down within the district, were liable, under sect. 36, to be rated as occupiers of land.

NOTICE of appeal was given by the East London Waterworks Com-

pany against a rate made upon them, on 27th December, 1850, by the Paving Commissioners under stats. 11 G. 3, c. 12, (a) and 57 G. 3, c. xxix., (b) in respect of land, within the streets of the paving district, in the possession of the Company and occupied by their mains, pipes, and other apparatus; and for the enjoyment of such land and of the right *706] of laying their mains and pipes therein. A case was, by *consent, and by order of Crompton, J., stated for the opinion of this Court, and was substantially as follows.

The appellants are an incorporated company, established, by Act of parliament, for the purpose of supplying parts of the eastern parts of the metropolis with water. Under their Act of incorporation, 47 G. 3, c. lxxii., (c) the Company are, by sect. 32, empowered to dig and break up the soil and pavement of any of the roads, highways, footways, streets and public places of certain parishes and places therein mentioned, including the said parish of Saint Mary, Whitechapel; and to sink and lay pipes, trunks, and other conveniences, and to put stop cocks, or plugs or branches from such pipes, and other conveniences, in such places and in manner as shall be necessary for the purposes of the Act, and to do all such acts as the Company shall from time to time think necessary and convenient for completing, amending, repairing, improving, and using the works authorized by the Act. The respondents are the Commissioners acting under and in pursuance of the said Acts, 11 G. 3, c. 12, and 57 G. 3, c. xxix., above mentioned.

By stat. 11 G. 3, c. 12, (d) the Commissioners are empowered to pave the streets and ways of the district, and, in certain cases, to make, alter, and remove sewers, drains, and grates, and to cause the streets and ways to be watered; and to perform certain other matters in the said Act specified. Sect. 36 is as follows.

*707] “And for defraying the charges and expenses attending the execution of the several powers by this Act granted, be it further enacted that, from and after the passing of this Act, a rate or assessment (over and above all rates and assessments now payable) shall, once in every year, or oftener if it shall be thought needful by the said commissioners or any seven or more of them, be made, laid, and assessed by the said commissioners or any seven or more of them, upon *all and every person or persons who do or shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments within any of the said streets, squares, lanes, courts, alleys, ways, or other public passages*, for raising such

(a) “For better paving the streets, squares, lanes, courts, alleys, ways, and other public passages, in that part of Goodman’s Fields, which lies in the parish of Saint Mary Matfellow, otherwise Whitechapel in the county of Middlesex, and also Red Lion Street and White Lion Street, lying contiguous to the said Fields, and for removing and preventing nuisances, annoyances, and obstructions therein.”

(b) Local and personal, public. “For better paving, improving, and regulating the streets of the Metropolis, and removing and preventing nuisances and obstructions therein.”

(c) Local and personal, public. “For better supplying with water the inhabitants of the parishes of Stratford Bow, otherwise Stratford le Bow, St. John Hackney, St. Mary Islington, St. Matthew Bethnell Green, and several other parishes, hamlets, townships, and places adjacent or near thereunto, in the counties of Middlesex and Essex.”

(d) As to the preamble, see p. 712, post.

competent sum or sums of money as the said commissioners or any seven or more of them shall from time to time think needful and direct, so as such rate or assessment, rates or assessments, do not in any one year exceed in the whole the sum of 1s. 2d. in the pound of the yearly rents or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults, or other tenements or hereditaments respectively as shall be situate in any of the said streets, squares, lanes, courts, alleys, ways, and other public passages, the greater part or parts of which said streets," &c., "respectively shall be actually begun to be paved with new or other stones of a flat surface by virtue or in pursuance of this Act, and not exceeding 9d. in the pound of the yearly rents or yearly value of such of the said lands, houses," &c., "or other tenements or hereditaments respectively as shall be situate in any of the said streets, squares," &c., "which shall be actually begun to be new paved, the footways whereof shall be constructed with new or flat stones, and the carriageways thereof with the old stones which shall be taken up in the same or any other of the said streets, squares," &c., "by virtue or in pursuance of this Act, and not exceeding 6d. in the pound of the yearly rents or yearly value of such of the said lands, houses," &c., "or other tenements or hereditaments respectively as shall be situate in any of the said streets, squares," &c., "which shall only be repaired by virtue or in pursuance of this Act." (Other clauses were referred to in arguing the case, but need not be set forth here. See pp. 712, 713, post.)

By sect. 24 of stat. 57 G. 8, c. xxix. it is enacted :

"That it may be lawful to and for the persons who, under any local Act or Acts of parliament for any parochial or other district within the jurisdiction of this Act, are empowered to make rates and assessments for the expenses of paving or keeping in repair the pavements of any streets or public places within such parochial or other districts, either separately or jointly with other purposes, from time to time and at all times after the passing of this Act, for and notwithstanding any provisions or restrictions, matters or things, in such local Act or Acts of parliament contained, to *make and sign all and every or any such rates or assessments as shall be from time to time necessary or expedient for paving or repairing the pave- [*708 ments of the streets and public places within such parochial or other district, pursuant to the direction of the local Act or Acts of parliament for such parochial or other district, or of this Act; and for the payment of all debts or charges heretofore incurred or hereafter to be incurred in and about the execution of such local Act or Acts of parliament and of this Act, or either of them, as to the paving and repairing the pavements of and in such parochial or other district; and for the payment of any interest or annuities charged or chargeable on the paving rates of the said parochial or other district, or for the payment of any principal moneys which may be due in respect thereof, either separately or jointly for other purposes, as to such persons shall seem reasonable and proper, not exceeding in amount in any one year double the sum or sums in the pound limited and fixed in the local Act or Acts of parliament for such parochial or other district as the rate or rates in the pound which may be made or and towards the charges of paving and repairing the pavements therein, and either separately or jointly with any other objects or purposes" (with an exception, as to amount, not material here); "and that such rates or assessments may be either substituted for the rates or assessments directed by such local Act or Acts of parliament to be made for or in respect of the paving and keeping in repair the pavements of such parochial or other district, either separately or exclusively or jointly with any other objects or purposes, or may be additional thereto, as the persons making the said rates or assessments from time to time at the making thereof may determine and direct; and that such rates and assessments, and also all rates or assessments made and signed from and after the passing of this Act, for and in respect of or towards the paving or repairing the pavements of the streets or public places in any parochial or other district, and either separately or jointly with or towards any other objects or

purposes, by virtue of any local Act or Acts of parliament, or by virtue of this Act, shall be laid upon all and every person or persons who do and shall inhabit, hold, occupy, be in possession of or enjoy, any messuages, tenements, lands, grounds, coach houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings or hereditaments, situate or being within any of the streets or places within the said parochial or other district, and shall be just and equal pound rates, and shall be laid according to the annual rents or value of such messuages, tenements, lands," &c., "warehouses or other buildings and hereditaments respectively; and also that all rates or assessments hereafter made by virtue of this Act shall be made and signed and allowed and published by the same persons and in the same manner as hath been directed by the local Act or Acts of parliament relating to each particular parochial or other district, as to the rates *or assessments for such parochial or other district for and

*709] towards the expenses of paving and repairing the pavements therein, and either separately or jointly with any other objects and purposes by such local Act or Acts of parliament."

The respondents have paved and repaired the streets, ways, and public places in the said district, and otherwise acted in execution of the several powers by the said Act of 11 G. 3, c. 12, granted.

The district of the said Commissioners is within the jurisdiction of the said Act of 57 G. 3, c. xxix.

The appellants are the owners and possessed of certain main and branch pipes, with the cocks and plugs belonging thereto, running under ground through the streets, squares, lanes, courts, alleys, and other public passages in various parts of the district embraced by stat. 11 G. 3, c. 12, and within the limits of the jurisdiction of the respondents as such Commissioners (and which parts of the said district have been paved and repaired, and over which the said Commissioners have otherwise exercised the powers of the last-mentioned Act), for the purpose of conveying water; and through which main and branch pipes water is conveyed by the appellants to the inhabitants of such district and others.

The plugs and stop cocks inserted in various parts of the said pipes are enclosed in smaller pipes, the extremities of which last-mentioned pipes terminate in iron boxes, which rise to, and form part of, the surface of the said streets and ways and public places within which the same respectively lie, and are stamped with the letters E. L. W. W., being the initial letters of the words East London Waterworks.

*710] Copies of the said Acts of parliament and of stat. 46 *G. 3, c. lxxxix., (a) and of the Acts amending the said Act of incorporation of the said Company, were to form part of the case.

The appellants have been possessed of their mains and pipes, with the plugs and cocks belonging thereto, within the district, for upwards of thirty years, and, until 1851, were never assessed to a paving rate or any rate whatever for the said district under the said Acts of 11 G.

(a) Local and personal, public. "For the better relief," &c., "of the poor within the parish of St. Mary, Whitechapel;" "for cleansing and lighting the squares and other passages and places, and keeping a nightly watch, for raising money for repairing the highways in certain parts of the said parish; and for raising money to repair the church of the said parish."

3, c. 12, and 57 G. 3, c. xxix., or either of them; but they have from time to time been assessed to and paid the rates for the relief of the poor and for the maintenance of the police, and the rates for lighting and cleansing the streets and other public places in the parish of St. Mary, Whitechapel, and the rate for repairing the church of the said parish, under stat. 46 G. 3, c. lxxxix.; by which Act, sect. 53, it is enacted that the rector, churchwardens, overseers of the poor, and vestrymen, or any nine or more of them, shall make and sign three distinct rates or assessments, not exceeding the amount of the respective sums thereinbefore directed to be settled and ascertained, "upon all and every the person and persons who do and shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament;" that is to say, one rate for the relief of the poor, one other rate for the repair of the church, and one other rate for cleansing the streets and regulating a nightly watch in certain parts of the said parish.

*For the purposes of the case the form and amount of the rate or of the assessments on the Company, if the Company [*711 should be rateable, were not in dispute.

If the Court should be of opinion that the appellants were liable to be rated in respect of the said mains, pipes, plugs, cocks, and apparatus on the pipes thereof, or in respect of any of them, or of the lands, ground, or space which they or any of them occupy, the said rate was to be confirmed; if the Court should be of a contrary opinion, the rate was to be quashed, or amended by striking out the assessment on the appellants.

Pashley, for the respondents.—The words "hold, occupy, possess, or enjoy any land," in sect. 36 of stat. 11 G. 3, c. 12, were intended to include such a holding, occupation, possession, and enjoyment as that exercised by the Company in respect of their pipes and apparatus. In *Rex v. The Corporation of Bath*, 14 East, 609, it was held that a corporation owning reservoirs and pipes for water laid down in certain parishes were rateable, under stat. 43 Eliz. c. 2, s. 1, as occupiers of land in those parishes. *Rex v. Rochdale Waterworks Company*, 1 M. & S. 634 (E. C. L. R. vol. 28), and *Rex v. Brighton Gas Light Company*, 5 B. & C. 466 (E. C. L. R. vol. 11), are to the same effect. It would not be necessary, in order to make the Company rateable within stat. 43 Eliz. c. 2, that the principal machinery of the waterworks should be within the district; *Rex v. Foleshill*, 2 A. & E. 598 (E. C. L. R. vol. 29). And here the words "hold, occupy, possess, or enjoy" are much wider than the words "occupier of lands" in stat. 43 Eliz. c. 2: The Company would, moreover, be liable, under stat. 11 G. 3, c. 12, s. 36, as occupiers of "hereditaments," according to *Rex v. The Trustees for paving Shrewsbury*, 3 B. & Ad. 216 (E. C. L. R. [*712 vol. 23). *East London Waterworks Company v. Trustees for Mile End*

Old Town, 17 Q. B. 512 (E. C. L. R. vol. 79), may be cited as a decision to the contrary; but there, as in *Rex v. The Manchester and Salford Waterworks Company*, 1 B. & C. 630 (E. C. L. R. vol. 8), which will probably be relied on, the word "land" was not introduced into the clause imposing the rate. [Lord CAMPBELL, C. J.—In *Chelsea Waterworks Company v. Bowley*, 17 Q. B. 358, the Company were held not liable to the land tax, although the Act(a) imposes the tax upon all bodies corporate "having or holding" "any lands, tenements, or hereditaments."] The judgment in that case proceeded upon the ground that, looking at the particular object of the Act in question, the words "having or holding" "any lands," &c., meant, having a legal interest in any lands, &c.: the meaning of the words "occupier of lands" in stat. 43 Eliz. c. 2, was not so restricted. [ERLE, J.—In the latter statute the occupiers of land are to be taxed only according to their ability; there does not seem to be any such limit fixed by these local Acts.] The Company have always paid the rate under stat. 46 G. 3, c. lxxxix. s. 53, which imposes it upon all who shall "hold, occupy, possess, or enjoy any land," &c.; using the same form of words as that in stat. 11 G. 3, c. 12, s. 36.

Bovill, contrâ.—The preamble of stat. 11 G. 3, c. 12, recites that "it would be of great benefit and advantage to the *inhabitants* of the said streets, squares," &c., if the said streets, squares, &c., were properly paved; that "the *inhabitants* of the said streets, squares," *713] &c., "are willing to pave the same at their own expense;" and that this cannot be effected without the aid of Parliament. That shows that the intention of the Act was to impose a rate only on the actual inhabitants, who would be benefited by the improvements. The Company are not within this class. Sects. 42, 44, which provide for a smaller proportionate assessment upon public buildings, dead walls, and void spaces of ground within or adjoining the said streets, squares, &c., and upon houses which have been unoccupied during a part of the time elapsed since the last rate, show that it was intended that the assessment should be distributed according to the amount of benefit arising from the paving to the parties assessed. The Company derive no benefit. If it had been intended to rate them in respect of their pipes, these would have been expressly mentioned in the rating clause. They are so mentioned in sects. 14—19, where provision is made for taking up pavements to repair them. Under sect. 19 the Commissioners have power to alter the position of the Company's pipes. The Company, therefore, have no interest in the land beyond a mere easement. [Lord CAMPBELL, C. J.—They may have a movable freehold.] The sewers would be rateable, if the pipes were rateable. The nature of the Company's interest is still further explained by the provisions of stat. 57 G. 3, c. xxix. By sect. 11 no water company can take up the pavement

(a) Stat. 38 G. 3, c. 5.

for the purpose of laying down pipes without notice to the Commissioners. By sects. 12—15, materials, arrangement, and repairs of all water pipes underneath the soil are subject to the supervision and control of the Commissioners. [Lord CAMPBELL, C. J.—“I do not see how this affects the question at issue. That depends simply [*714 upon the construction of the rating clause, stat. 11 G. 3, c. 12, s. 36.] Several provisions of the local and general Acts are important as showing that the Company cannot be said to occupy, possess, or enjoy land, within the meaning of the rating clause. By sect. 52 of stat. 57 G. 3, c. xxix., the pavements and other materials of the streets are vested in the Commissioners. [ERLE, J.—But the land beneath the pavement is occupied by the Company. It may, however, be a question whether by “land,” in the rating clause, is meant other than surface land. It has been held that mines are exempt from taxation under stat. 43 Eliz. c. 2, except coal mines, which are expressly mentioned. Here the rating clause provides that the parties liable are to be assessed at different rates according to the nature of the pavement. It would therefore be necessary, if the pipes are rateable, to calculate what portion of them lay under each description of pavement.] That would be almost impossible; and therefore it is clear that by “land” was meant only the surface.

Pashley, in reply.—The difficulty suggested as to making different assessments on different portions of the pipes exists, in some degree, with respect to houses, which are clearly rateable. The Company derive a profit from the use of the land, and “enjoy” it within the meaning of the rating clause. Indeed they could bring an action of trespass quare clausum fregit for an interference with their pipes by any one not authorized under the Acts. In *Crease v. Sawle*, 2 Q. B. 862, 886 (E. C. L. R. vol. 42), the Court intimated that, in stat. 43 Eliz. c. 2, it was *intended, by the words “every occupier of lands,” to include all occupiers of any description of real estate. [*715 As to the pipes not being expressly mentioned in the rating clause, that is because the word “land” would include the pipes laid down in it. [ERLE, J.—Would the Commissioners of Sewers be rateable in respect of their drains?] They would not, because they derive no profit from their occupation. [Lord CAMPBELL, C. J.—They are in much the same position as the surveyors of highways.] Here the Company have a direct interest. (He was then stopped by the Court.)

Lord CAMPBELL, C. J.—I am of opinion that the Company are rateable. By sect. 86 of stat. 11 G. 3, c. 12, the rate is to be laid on all persons who “shall inhabit, hold, occupy, possess, or enjoy any land, house,” &c., “tenements or hereditaments within any of the said streets, squares,” &c. Now, by stat. 43 Eliz. c. 2, by which real property is made rateable to the poor, the rate is to be laid on “every occupier of lands,” among others; and we are entitled to give the same definition

of occupation of land, in stat. 11 G. 3, c. 12, as has been given to it in stat. 43 Eliz. c. 2. By a long series of cases it has been decided that water companies or gas companies are, under the latter statute, rateable, as occupiers of land, in respect of their pipes which are laid beneath the soil; and we are therefore justified in holding that the Company here are also rateable, in the same character, under stat. 11 G. 3, c. 12. In *Rex v. Manchester and Salford Waterworks Company*, 1 B. & C. 630 (E. C. L. R. vol. 8), a water company was held not to be rateable under a local Act, because the *word "land" was not in the rating clause, and because the words "other tenements" were held to refer only to matters ejusdem generis with those before enumerated. The decision in *East London Waterworks Company v. Trustees for Mile End Old Town*, 17 Q. B. 512 (E. C. L. R. vol. 79), proceeded upon the same grounds. We may reasonably infer that, if the word "land" had been introduced into the local Acts under which the rate in these cases was imposed, the Company would have been liable to be rated. In *Chelsea Waterworks Company v. Bowley*, 17 Q. B. 361, we were careful to state that we did not intend to interfere with the decisions under stat. 43 Eliz. c. 2. We held that the Company in that case were not liable to be rated to the land tax, because they had no interest in the land. Here the Company have a direct interest in the land, and derive advantage from the works under the Act. The situation of their pipes may be altered by the Commissioners; but they are the occupiers of the land in which the pipes are laid. I think, therefore, that this rate was properly made.

COLERIDGE, J.—I am of the same opinion. I do not rely upon any supposed occupation of the surface by the Company (indeed the surface is more in the occupation of the Commissioners), but upon the undoubted occupation of the subsoil by the Company, by means of their pipes which are laid down there. Where the same words occur in different Acts having a similar object, we should endeavour to adopt the same construction in each case. The words in the local Act here are even more extensive than those in stat. 43 Eliz. c. 2; and therefore there is *no reason for giving a less extensive construction *to the former than to the latter, as we did in *Rex v. Manchester and Salford Waterworks Company*, 1 B. & C. 630 (E. C. L. R. vol. 8), and *East London Waterworks Company v. Trustees for Mile End Old Town*, 17 Q. B. 512 (E. C. L. R. vol. 79). Judgment must therefore be for the respondents.

ERLE, J.—The Company are clearly rateable as occupiers of land. I have looked carefully through the local Act, and cannot find anything which restricts the nature of the occupation.

CROMPTON, J.—The only cases cited, where a Company has been held not rateable under these circumstances, are where the word "land" was not in the rating clause. Here all occupiers of land are expressly made

rateable. I was at first rather struck with my brother Erle's suggestion of the difficulty which would arise in apportioning the assessments upon different portions of the pipes; but I do not think that difficulty sufficient to rebut the clear inference to be drawn from the language of sect. 86. Judgment for the respondents.

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***The QUEEN v. The Vicar, Churchwardens, and Inhabitants of HILLINGDON. June 8. [*718**

At a vestry, held under stat. 58 G. 3, c. 69, for the purpose of electing surveyors of highways, of which public notice had been given, it was agreed that the vote should be taken by a show of hands, leaving it open to any one to propose that the votes should be taken according to the statute. A. and B. were respectively proposed and seconded for the office of surveyor; and, on a show of hands, A. had a majority. It was then proposed and seconded, on behalf of B., that the votes should be taken according to the statute. No objection was made; and, on the votes being so taken, B. had a majority, and was declared duly elected. A. then demanded a poll of the whole parish.

Held that, the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; that the election of B. was valid; and that a mandamus for another meeting to elect would not lie.

PASHLEY, in last Easter term, obtained a rule calling on the vicar, churchwardens, and inhabitants of the parish of Hillingdon, in the county of Middlesex, to show cause why a mandamus should not issue commanding them to assemble themselves in vestry for the purpose of electing a surveyor of the highways for the said parish.

From the affidavits it appeared that the parish of Hillingdon is divided into four districts, and that it has been usual to elect one ratepayer residing in each to be the surveyor of the highways in that district.

On 27th March, 1852, public notice was given that a vestry would be held on the 2d April following, "to elect surveyors of the highways for the year ensuing" and for other purposes. The vestry was held on the day appointed. At the commencement of the proceedings it was proposed and seconded that the votes of the vestry should be taken according to stat. 58 G. 3, c. 69 (Sturges Bourne's Act), s. 3; but the motion was withdrawn upon a proposal, by the vestry clerk, that the votes should be taken by a show of hands in the first instance, leaving it open to any inhabitant to propose that the votes should be taken according to the statute. *Certain proceedings having then been carried by a show of hands, without dissent, two rate-payers, Haynes and Roadnight, were respectively proposed and seconded for the office of surveyor of highways for a particular district. A show of hands was taken, upon which Haynes had a majority. It was then proposed and seconded, on behalf of Roadnight, that the votes should be taken according to Act of parliament. This was done; and Roadnight had a majority. Haynes

then demanded a poll of the whole parish: but the vicar, as chairman, declined to grant it, the vestry clerk having stated that Haynes ought to have demanded a poll at an earlier stage of the proceedings, and that the reckoning of the votes according to the statute completed the election.

The affidavits also stated that there is no select vestry for the parish; and that the vestry clerk is appointed under stat. 13 & 14 Vict. c. 57.(a)

J. Gray now showed cause.—The application for a poll of the whole parish was made too late. It should have been demanded after the show of hands; *Campbell v. Maund*, 5 A. & E. 865 (E. C. L. R. vol. 81). The functions of the vestry were discharged as soon as the votes of the rate-payers present had been taken according to the statute. That is, in effect, a polling of the rate-payers: and, if the rate-payers present in vestry elect to have recourse to that form of poll, a poll of the whole parish cannot be afterwards demanded; *Campbell v. Maund*. It was decided, in *Regina v. The Rector of Lambeth*, 8 A. & E. 356 (E. C. L. R. vol. 35), that, although, at a polling in vestry, all qualified persons are entitled to come in and vote, a polling of only the rate-
*720] payers *present at the vestry is valid, unless it be expressly proved that some rate-payers who wished to vote were excluded. It will be contended that the meeting should have been adjourned. But the power of adjourning the vestry is in the vestry itself; *Stoughton v. Reynolds*, 2 Str. 1045: and the vestry, in effect, declined to adjourn, by proceeding to take the votes of the rate-payers who were present. In *Regina v. The Rector of Lambeth*, 8 A. & E. 356 (E. C. L. R. vol. 35), it was held that the vestry was not bound to adjourn, although it was bound to admit any qualified person who wished to come in and vote. *Rex v. The Archdeacon of Chester*, 1 A. & E. 342 (E. C. L. R. vol. 28), (b) also shows the rule on this subject. As to the vicar, he, at all events, had no power to grant a poll; the power is in the vestry.

Pashley, contra.—The rate-payers are not precluded from demanding a poll of the whole parish by having at first agreed that the votes of those present should be taken according to the statute. The demand of a poll amounts to an abandonment of the previous proceedings; *Anthony v. Seger*, 1 Hagg. Consist. C. C. 9, 13. In *Regina v. The Vestrymen, &c., of St. Pancras*, 11 A. & E. 15, 26 (E. C. L. R. vol. 89), Lord Denman, in giving judgment, says, “the common law right” “is generally understood to be that any voter, however satisfied with the correctness of the declaration on the show of hands, yet may appeal from it to the whole body of electors, and keep a poll open till all have had the opportunity of attending to record their suffrages.”

(a) “An Act to prevent the holding of vestry or other meetings in churches, and for regulating the appointment of vestry clerks.”

(b) And see *Rex v. Churchwardens of St. Mary, Lambeth*, 1 A. & E. 346 (E. C. L. R. vol. 28), note (b).

Lord CAMPBELL, C. J.—I am of opinion that the *election [*721 was valid, and that a mandamus will not lie for another meeting to elect. There is no doubt that any rate-payer present at the vestry may appeal from the decision upon a show of hands to a polling of the rate-payers; but, if that polling is, with the consent of all present, confined to the rate-payers assembled at the vestry, any subsequent demand that a poll of all the rate-payers in the parish should be taken is wholly illegal.

COLERIDGE, J.—The question here is, not what is the general rule of voting at vestries, or what course might have been followed in the present instance, but whether, under the circumstances, the party applying for the mandamus has any right to set aside the proceedings that were actually taken. I am of opinion that he has not. He should have made his call for a poll of the whole parish immediately upon the show of hands; he was not entitled to demand it after having acquiesced in the taking a poll of those rate-payers only who were present. That form of poll is, in itself, perfectly legal; and the election was a valid one.

WIGHTMAN, J.—Public notice was given that a vestry would be held; and it must be taken that all the rate-payers who were interested attended. No objection was made when a poll of the rate-payers in vestry was proposed; and therefore a poll of the whole parish could not be afterwards claimed by any one there, the meeting having elected to have recourse to the more limited form of poll.

ERLE, J., concurred.

Rule discharged with costs.

*JOHN TIMMINS and MARY his Wife v. GIBBINS, Public Officer, &c. June 3. [*722

Plaintiff deposited with defendants, a banking Company, 80*l.*, consisting partly of certain notes of a country bank, payable either at that bank or in London, and representing 65*l.* The Company gave a receipt as follows:

Received of M. W. 80*l.*, for which we are accountable. 80*l.*, at 3*l.* per cent. interest, with fourteen days' notice.

The Company sent the notes, on the same day, to their agents in London, who presented them on the following day, when they were dishonoured. The agents sent them back by that evening's post to the Company, who, on the following day, gave notice of dishonour to plaintiff, and, on plaintiff's giving fourteen days' notice of withdrawal, tendered the notes back, which plaintiff refused. The Company refused to pay the amount of the notes. The country bank, which was about five miles from the office of the Company, had stopped payment from the close of the day on which the notes were deposited.

Held, that plaintiff could not recover the amount of the notes from the Company, either as money lent or as money had and received.

DEBT against defendant, as public officer of the Birmingham Banking Company, for money lent by the female plaintiff, *dum sola*, to the defendant; for money had and received by defendant to the use of

the female plaintiff, *dum sola*; and on an account stated between her, *dum sola*, and the defendant.

Plea: *Nunquam indebitatus*, except as to 15*l.* 2*s.* 9*d.*, parcel, &c., paid into Court. Issue thereon. The 15*l.* 2*s.* 9*d.* was taken out of Court.

There was also an issue upon a special plea, as to which the jury were discharged.

On the trial, before Wightman, J., at the Staffordshire Spring Assizes, 1852, it appeared that, on 26th June, 1851, the female plaintiff, being then unmarried, deposited with the Dudley branch of the Birmingham Banking Company 80*l.*, of which 65*l.* consisted of notes of Rufford's Bank, at Stourbridge, five miles from Dudley. These notes were made payable either at Stourbridge or at Messrs. Glyns', London. The agent of the Company at Dudley gave her a receipt as follows:

"Received of Mary Weal 80*l.*, for which we are accountable. For the directors and proprietors of The Birmingham Banking Company. R. H. SMITH, Manager." *723] "80*l.*, at 3*l.* per cent. interest, with fourteen days' notice."

The Stourbridge notes were sent to Jones, Loyd & Co., the agents of the Company, by the evening post on 26th June, and presented by them, on 27th June, at Messrs. Glyns'. Payment was refused. The Company received them back on 28th June, and, on that day, sent notice of their dishonour to the female plaintiff. The Stourbridge Bank paid up to the close of banking hours on the 26th June, but did not open afterwards. On 18th January, the plaintiffs gave fourteen days' notice of withdrawal, when the Company tendered the notes, which the plaintiffs refused. The plaintiffs, on 29th January, demanded payment, which was refused by the Company. The learned Judge directed a verdict for the defendant, with leave to move to enter a verdict for the plaintiffs for 65*l.* *Keating*, in last Easter Term, obtained a rule nisi accordingly.

Alexander and *Chance* now showed cause.—The Company are not liable for the amount of the notes. *Camidge v. Allenby*, 6 B. & C. 873 (E. C. L. R. vol. 13), (a) will be relied on; but there the party receiving the notes had been guilty of laches in not taking the proper steps to get them cashed, or returning them promptly to the party from whom he received them. The obligation incumbent on the holder in such a case appears in *Rogers v. Langford*, 1 Cr. & M. 637, S. C. 3 Tyr. 654, and *Turner v. Stones*, 1 Dowl. & L. 122. Here the Company lost no time in presenting the notes for payment in London, and informing the plaintiffs of their dishonour. The loss ought therefore to fall upon the plaintiffs.

*724] **Keating* and *J. Gray*, contra.—The Company received the notes, not as negotiable instruments, but as cash, and are there-

(a) See *Robson v. Oliver*, 10 Q. B. 704 (E. C. L. R. vol. 59).

fore liable for the amount, according to the distinction laid down by Littledale, J., in *Camidge v. Allenby*, 6 B. & C. 378, 385 (E. C. L. R. vol. 18). [Lord CAMPBELL, C. J.—In that case the notes were given in payment of a debt; here they were only deposited with the Company, they undertaking to return them under certain conditions.] The Company received with a view to their advantage; the transaction amounted to a purchase of the notes by them. [Lord CAMPBELL, C. J.—Surely this is not a sale of the notes. But, if it were, I do not see that the Company is necessarily to suffer.] The general rule is, that, where notes are given in payment, the party to whom they are paid must bear the loss if they are dishonoured, unless they were given in payment of an antecedent debt. The Company, in fact, have discounted the notes; and in *The Governor and Company of the Bank of England v. Newman*, 1 Ld. Raym. 442, it was held that the discounter of a bill payable to bearer must sustain the loss consequent upon payment being refused, unless the note was endorsed to him by the party for whom it was discounted. [Lord CAMPBELL, C. J.—I do not see what difference the endorsement makes.] The endorsement constitutes a distinct security. [Lord CAMPBELL, C. J.—If a party obtains of a banker, without fraud, cash in exchange for a check on a bank which has failed for some time, is that a sale of the check?] In that case the transaction would probably amount to a warranty that the check was what it purported to be. [Lord CAMPBELL, C. J.—If so, I think there was a similar representation *by the plaintiffs here.] Here the notes were [*725 simply deposited with, and received by, the Company as and for *cash*, the Company agreeing to pay the amount at fourteen days' notice. [WIGHTMAN, J.—Can the plaintiffs sue for money had and received? Payment of the notes having been refused, the Company would be entitled to answer that they had not received any money.] *Ward v. Evans*, 2 Ld. Raym. 928, decides that an action for money had and received will lie under such circumstances. Money deposited with a banker is equivalent to money lent to him; *Pott v. Clegg*, 16 M. & W. 821;† and, for the reasons already stated, the deposit of the notes in the present case is equivalent to a deposit of money. An action lies here, therefore, either for money lent or money had and received.

Lord CAMPBELL, C. J.—I am of opinion that the plaintiffs are not entitled to bring an action either for money lent or for money had and received. No doubt, at the time of the deposit, both parties believed that the Stourbridge Bank was solvent, and that these notes were valuable securities. It turned out, however, that they were worthless. No laches can be imputed to the Company; for they sent the notes to London immediately upon receiving them, and gave notice of their dishonour to the female plaintiff immediately upon receiving such notice themselves. The case is the same as if the Stourbridge Bank had been insolvent long before the day on which the notes were deposited, and

neither party had been aware of it. There are no grounds which will support a count either for money lent or money had and received, because there is a failure of the consideration upon which the defendant's promise would be *founded. It was argued that the transaction amounted to a purchase of the notes by the Company. But it is impossible to give it that character; it was a deposit, made on the understanding that the amount should be repaid upon fourteen days' notice. I cannot agree to the general rule which it has been attempted to lay down, that bank notes are paid in at the risk of the party receiving them, except when they are paid in discharge of an antecedent debt. If, as I suggested in the course of the argument, a person obtains, in good faith, change for a check which turns out to be worthless, the loss must fall on him. In fact it is difficult to say that there can be any case in which the debt is not antecedent to the payment. Even where the money is paid over the counter at the time of the sale, there must be a moment of time during which the purchaser is indebted to the vendor. (a) It is not, however, necessary for us to give any opinion upon this point, as there was no sale here between the parties.

COLERIDGE, J.—I am of the same opinion. There is no fraud or laches on either side; and the question is, simply, on whom is the loss to fall? In justice it ought to fall upon the plaintiffs. The female plaintiff deposited with the Company what she represented as so much money's worth: and it turns out that it is worth nothing. Why is the Company to suffer for this? I do not go so far as to say that there was a warranty that the notes were good. But the Company accepted them as money's worth, and, under that impression, gave the receipt containing the promise to repay. That promise being founded on a mistake of fact, the consideration for it *fails; and the plaintiffs, therefore, have no ground of action in respect of such promise. They must, upon whichever count they rely, show that money was received by the Company from the female plaintiff. *Prima facie* the receipt shows that; but the defendant is at liberty to prove that it was given under a mistake of fact.

WIGHTMAN, J.—I adhere to the opinion which I formed at the trial, that the plaintiffs cannot recover on either count. The count for money had and received would be the most appropriate, provided they could recover at all. The female plaintiff offered to deposit with the Company certain alleged securities, which were assumed by both parties, at the time, to be worth 65*l.*, and for the amount of which, upon that assumption, the Company agreed to be accountable. It turned out that they were worth nothing; but that was through no fault of the Company. The consideration, therefore, for the agreement on the part of the Company failed altogether, and they are not liable to an action in respect

(a) See *Bussey v. Barnett*, 9 M. & W. 312;† *Littlechild v. Banks*, 7 Q. B. 739 (K. C. L. R. vol. 53).

of that agreement. The case is quite different from that suggested of a transaction amounting to a purchase of the note; here nothing took place which could possibly be called a purchase. Some nice distinctions were taken between notes paid in discharge of an antecedent debt, and notes paid at the time of the purchase, in which latter case, it was contended, the doctrine of caveat emptor would apply. It is not, however, necessary for us to decide that point, as here there was no sale at all between the parties.

(ERLE, J., had left the Court during the argument.)

Rule discharged.

Payment in bills of an insolvent bank is not a satisfaction of a debt, although at the time and place of payment the bills are in full credit, and the parties are wholly ignorant of such insolvency, if the bank was in fact insolvent previous to such payment: *Ontario Bank v. Lightbody*, 13 Wendell, 101; *Wainwright v. Webster*, 11 Vermont, 576; *Thomas v. Todd*, 6 Hill, 340; *Watson v. M'Laren*, 19 Wendell, 557; *Mages v. Carmack*, 13 Illinois, 289. Contr: *Lowrey v. Murrell*, 2 Porter, 280; *Bayard v. Shunk*, 1 Watts & Serg. 42; *Scruggs v. Gass*, 8 Yerger, 175.

*WILKINSON v. The ANGLO-CALIFORNIAN Gold Mining Company. June 4. [*728]

A person who has subscribed for shares in a joint stock Company, completely registered under stat. 7 & 8 Vict. c. 110, is not entitled to certificates under sect. 51 till he has executed the deed of settlement or a deed referring thereto.

To state in a declaration that plaintiff executed the deed of settlement, except as to a certain specified clause, is not equivalent to alleging that he executed the deed.

CASE. The declaration stated that the defendants were a joint stock company, completely registered under and in pursuance of stat. 7 & 8 Vict. c. 110 ("for the registration, incorporation, and regulation of joint stock companies"), and formed by a deed of settlement: excuse of profert, the deed being in the possession of the defendants. Averment that the deed contained, amongst others, provisions that the capital should be 50,000*l.*, to be subscribed for in 100,000 shares of 10*s.* each, and that the whole of such sum of 10*s.* for each share should be paid up within twenty-one days after complete registration; and a provision, designated in the aforesaid deed of settlement by the number of 179, and which was set out verbatim, but on the terms of which nothing ultimately turned. Averments, that, before and at the time of the complete registration of the defendants as such Company as aforesaid, and before and at the time of the plaintiff executing the said deed of settlement, as in the declaration after mentioned, plaintiff became a subscriber for twenty shares of 10*s.* each in the said capital or

joint stock of the defendants, such shares to be received by the plaintiff as soon as the defendants were completely registered; and that, within twenty-one days after the complete registration of the defendants, and before the execution of the said deed of settlement by the plaintiff as in the declaration after mentioned, and within three months from the day of the date of the said deed, plaintiff had paid defendants the full amount of *10s. for and in respect of each of the *729] said twenty shares so subscribed for by him. And that, after the complete registration of defendants as such Company as aforesaid, and before the committing of the grievances after mentioned, and whilst the plaintiff was such subscriber as aforesaid, "the plaintiff duly executed the said deed of settlement under which the defendants as such Company were formed as aforesaid, except as to the said therein and hereinbefore mentioned provision designated by the number of 179 as aforesaid," of which the defendants had notice; and plaintiff then, and after the defendants were completely registered, became and was entitled, under and by virtue of the said statute and of the premises aforesaid, to have made out by the defendants a certificate of the proprietorship of each of the before-mentioned shares for which plaintiff had so subscribed, and to have such certificate with the common seal of the defendants affixed thereto delivered to him, on demand. Breach: that the defendants refused to give such certificates, though requested.

Plea. That the formation of the said Company was commenced after 1st November, A. D. 1844, and that it was a Company within the operation of the Act of parliament in the declaration mentioned; and that plaintiff had not at the time of the committing of the alleged grievances executed the deed of settlement of the said Company, or any deed referring thereto. Verification.

Special demurrer, on the grounds (among others) that the plea did not confess that the plaintiff executed the deed of settlement, and that it contained an argumentative traverse of the execution alleged in the declaration.

Joinder in demurrer.

*730] **Paterson*, for the plaintiff.—Stat. 7 & 8 Vict. c. 110, s. 25, authorizes a joint stock company when completely registered to issue certificates of shares. Sect. 7 entitles the Company to be completely registered when no more than one-fourth of the subscribers have executed the deed of settlement; so that it is clear that execution of the deed of settlement by a particular subscriber is not a condition precedent to the Company's power to issue certificates of his shares. The main question raised on this record is, whether execution of the deed by that particular subscriber is a condition precedent to his right to require the Company to issue his certificates. No such condition is imposed by the Act. Sect. 51 gives the right to certificates in these words: "That, on demand of the holder of any share in any joint stock

Company completely registered under this Act, the Company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, specifying the share in the undertaking to which such shareholder is entitled, and the amount paid up in respect of such share at the date of such certificate, and shall have the common seal of the Company affixed thereto." There is nothing here to impose any condition precedent. [CROMPTON, J.—The persons who under this section may demand certificates are the holders of shares; and in the latter part of the section the word "shareholder" is used as equivalent to that phrase. In the interpretation clause, sect. 8, we find the word "subscriber" to mean "any person who shall have agreed in writing to take or have taken any shares in a proposed Company or in a Company formed, and who shall not have executed the deed of settlement, or a deed referring thereto:" the word "shareholder" to mean "any person *entitled to a share in a Company, and who has executed the deed of settlement, or a deed referring to it." When I was at the bar it was considered prudent in cases like the present to add a breach for not permitting the plaintiff to execute the deed of settlement. The question now raised seems to be whether that was necessary, or merely a measure of precaution.] The interpretation clause puts an arbitrary meaning on the word "shareholder;" but it leaves the phrase "holder of shares" to bear its ordinary meaning. Sect. 52 shows that a person may be a holder of shares without any certificate: sect. 26 that he may be a "shareholder" before executing the deed, though he is restricted in his powers and privileges till he does.

Then, even supposing the execution to be a condition precedent, performance is here averred; and the plea is bad as being an argumentative traverse of that averment. [*Per Curiam*.—It is impossible in law to execute a deed in part only. There is therefore no allegation of execution; and the only question on this record is whether such an allegation was necessary.]

Willes, for the defendants.—By sect. 26 it is provided, "with regard to subscribers and every person entitled or claiming to be entitled to any share in any joint stock company the formation of which shall be commenced after the 1st day of November, 1844, that until such joint stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein, and that every contract for or sale or disposal of such share or interest shall be void, *and that every person entering into such contract shall forfeit a sum not exceeding ten pounds; and that for better protecting purchasers it shall be the duty of the directors of the company by whom certificates of shares are issued to state on every such certificate the date of the first complete registration of the com-

pany, as before provided; and that if any such director or officer knowingly make a false statement in that respect then he shall be liable to the pains and penalties of a misdemeanor." The argument for the plaintiff seems to assume that, though the plaintiff is by this section forbidden to dispose of his shares, yet he has a right to obtain a certificate, which by sect. 52 is *prima facie* evidence of his title to the shares, and which he could use for the purpose of deceiving persons into purchasing from him as a shareholder, and could not use for any good purpose; and that it lies on the defendants to show some express enactment to deprive the plaintiff of his right to such certificate. The burthen is the other way: it rests on the plaintiff to show some enactment clearly giving such an unreasonable right. But sect. 51 and sect. 3 read together do expressly impose a condition precedent. The definition in sect. 3 is to be substituted for "shareholder" in sect. 51, unless excluded by the context or by the nature of the subject-matter. If it be inserted there, the enactment stands "on demand of the holder of any share in any joint stock company completely registered under this Act, the company shall cause a certificate of the proprietorship of such share to be delivered to such *person entitled to a share in the company, who has executed the deed of settlement, or a deed referring thereto.*" So far from being ex-
 *738] cluded by the context or *subject-matter, that meaning is required by it; for otherwise the company would be compelled to create *prima facie* evidence enabling a person who had not subscribed the deed to mislead others, who on the faith of the certificate would believe he was a shareholder.

Paterson was heard in reply.

LORD CAMPBELL, C. J.—I am of opinion that the defendants are entitled to judgment. The question turns entirely on the construction of the statute. Looking to sect. 51, by itself, without the aid of the rest of the Act, I should say that the plaintiff was entitled to judgment, as that section gives to the shareholder an absolute right to the certificate on demand, and the plaintiff is what in the ordinary meaning of the word would be understood by a shareholder. But the Legislature has enacted (sect. 3) that in this Act certain "words and expressions are intended to have the meanings" thereby assigned to them "so far as such meanings are not excluded by the context or by the nature of the subject-matter." Among those words we find that "shareholder" is to mean a person who is entitled to shares and has executed the deed. Now, if we assign that meaning to the word in sect. 51, we make it give the right of demanding a certificate to such persons only as are entitled to shares and have executed a deed. There is nothing in the context or the subject-matter to exclude this meaning; and therefore we must give it to the word here. In the beginning of sect. 26 the word "shareholder" is used as applicable to persons who have not executed the deed; and it would seem repugnant to attach the statutable meaning to the

word *in sect. 26 ; but that affords no ground for rejecting the statutable meaning in sect. 51. Then, the enactment being such, [*784 the declaration shows that the plaintiff is in one sense of the word a shareholder, but not within the meaning of the word as used in sect. 51. Therefore the declaration is defective, and the plea good.

COLERIDGE, J.—I am of the same opinion. If it be a condition annexed to the right of demanding a certificate that the plaintiff should execute the deed, the declaration is bad and the plea good. Now the plaintiff is bound to bring himself within the enactment contained in sect. 51. A faint attempt was made to raise a distinction, because the phrase "holder of any share" is used in the beginning of that section, instead of the word "shareholder" which occurs in sect. 3: but, as the words "such shareholder" are used in sect. 51 as equivalent to "holder of any share," it is clear that the words are to be taken as having the same sense; and, unless that meaning is excluded by the context or subject-matter, the sense must be, persons who are entitled to shares, and have executed the deed. It is clear that such a meaning is just, as otherwise persons who had not executed the deed would have every benefit and no liability. Supposing, as a mere hypothesis, that in sect. 26 the word bears a different meaning, it does not affect the construction of sect. 51.

ERLE, J.—The question is whether the plaintiff is entitled to the certificates, he not having executed any deed. To determine that question we must look to sect. 51, which gives the right to certificates, and say on what title that right is given. It is clear on reading the *sec- [*785 tion that the right to a certificate is given to the person demanding it, he being a shareholder. Then sect. 3 says that shareholder shall mean a person entitled to shares, who has executed the deed. The declaration does not show that the plaintiff is such a person, and it is therefore bad. The plea alleges that he is not such a person; and it is good.

It seems to me that this construction is consistent with the whole scheme of the Act. The Act distinguishes between inchoate shareholders, who have not executed any deed, who in sect. 3 are called "subscribers," and complete shareholders who have executed the deed, and who in sect. 3 are called "shareholders." One great object of the Act was to put obstacles in the way of those who wish to play fast and loose, to take the benefit of the shares without being liable to pay calls. Therefore "subscribers" are neither to obtain benefit themselves nor to transfer their shares to others till they have executed the deed and so become liable to calls. Another object was to furnish facilities of evidence for those who were shareholders. Now, if a mere subscriber was entitled to certificates, which, by sect. 52, are *prima facie* evidence that he is a shareholder, the object of the Act would be frustrated, as he might go into the market with false evidence of his title.

CROMPTON, J.—I am of the same opinion. The facts stated in the declaration show that the plaintiff is what the Act means by “subscriber,” not what is there meant by “shareholder.” And I quite agree that there is nothing to exclude the statutable meaning of “shareholder” in sect. 51. It is argued that the meaning is excluded by the context *736] in sect. 26. It seems to me very doubtful *what is the true construction of sect. 26; but I wish to express no further opinion upon that point, which raises some difficult questions as to the liability to calls, now, I believe, pending in the Exchequer.

Judgment for defendants.(a)

Reported by C. Blackburn, Esq.

(a) See *Galvanized Iron Company v. Westoby*, 8 Exch. 17.†

The following case may conveniently be placed here.

STEWART v. The ANGLO-CALIFORNIAN Gold Mining Company.

In the deed of settlement of a joint stock Company regulated by stat. 7 & 8 Vict. c. 110, it may lawfully be made a rule that the share of any subscriber for part of the Company's capital, who shall not execute the deed within three months from its date, shall be forfeited if the directors think fit. Although no provision be made for giving the subscriber notice to execute, or notice of intention to enforce the forfeiture. And a subscriber whose shares have been declared forfeit under the rule, without any such notice, cannot maintain an action against the Company for refusing to give him certificates of his holding such shares.

It is no answer to such action that the refusal was not authorized by the Company under their seal.

Although, by stat. 7 & 8 Vict. c. 110, s. 2, a shareholder in such Company is a person who has executed the deed of settlement or a deed referring to it, the plaintiff, in an action against the Company for not permitting him to execute, need not aver that he was denied permission to execute a deed so referring: it is enough to state that he was not allowed to execute the deed.

CASE. The declaration stated that defendants, before and at the times of the committing of the grievances after mentioned, viz. on, &c., were, and from thence hitherto have been, and still are, a joint stock company completely registered under the statute, &c. (7 & 8 Vict. c. 110), and formed by a certain deed of settlement required according to the said statute to be executed by the shareholders of such company: *737] That, before and at *the times of the committing, &c., viz. on, &c., plaintiff became and was and still is entitled to 240 shares in the capital or joint stock of the defendants; and also, before and at the times of the committing, &c., and after defendants had completely registered under the said Act of parliament, to wit, on, &c., plaintiff, being so entitled to the said shares as aforesaid, became and was entitled, under and by virtue of the said statute, to have made out by defendants a certificate of the proprietorship of each of the before-mentioned shares to which plaintiff was so entitled as aforesaid, specifying therein respectively the share to which plaintiff was entitled, and the amount paid up

in respect of such share at the date of such certificate ; and to have such certificate, with the common seal of the defendants affixed thereto, delivered to him the said plaintiff on demand : And, although afterwards, and before and at the time of the committing, &c., and before the commencement of this suit, and whilst plaintiff was so entitled to the said shares as aforesaid, to wit, on, &c., he the plaintiff was ready and willing, and from thence hitherto hath always been and continued to be ready and willing, to execute the deed of settlement hereinbefore mentioned, and under which the defendants as such company are formed as aforesaid ; of which defendants during all the time aforesaid had due notice, and were then requested by plaintiff to suffer and permit plaintiff to execute such deed of settlement as aforesaid : And although also, after plaintiff had become, and whilst he was, entitled to the said shares as aforesaid, and before the committing, &c., to wit, on, &c., plaintiff did, pursuant to the said statute, demand of defendants that they should cause a certificate of the proprietorship of each of the before-mentioned shares to be delivered to plaintiff as *holder and proprietor of such shares pursuant to the provisions of the said Act : Yet defendants, well knowing, &c., and contriving, &c., did not nor would when they were so requested as aforesaid, or at any other time afterwards, although a reasonable time hath long since elapsed, suffer or permit plaintiff to execute such deed of settlement as aforesaid, but then wholly refused, and have hitherto continued to refuse, to suffer or permit the plaintiff to execute such deed : And that defendants did not nor would, on demand made by the plaintiff as aforesaid, or at any other time, cause a certificate of the proprietorship of each of the before-mentioned shares or of any or of either of them to be delivered to plaintiff as proprietor thereof : but defendants, although often requested so to do, and although a reasonable time, &c., had elapsed before the commencement of this suit, have hitherto wholly neglected, &c. Whereby plaintiff hath been deprived of the evidence of his title as proprietor of the shares, and of the power to receive dividends, &c., and of the remedies and powers given by the statute to shareholders, and hath been prevented from selling and disposing of the shares, &c. [*738]

Pleas. 1. Not guilty.

2. That plaintiff did not become nor was he entitled to the said shares in the capital or joint stock of the defendants in the declaration mentioned, or any or either of them, or any part thereof, in manner and form, &c.

3. Except as to so much of the declaration as charges defendants with not suffering plaintiff to execute the deed, and refusing and continuing to refuse to suffer him, &c. : That plaintiff did not become nor was he entitled under and by virtue of the statute in the declaration mentioned to have made out by defendants such *certificate of the proprietorship of each of the said shares as in the declaration mentioned, [*739]

or to have such certificate with the common seal of the defendants affixed thereto delivered to him on demand, in manner and form, &c.

4. As to the parts of the declaration excepted in the preceding plea: That the plaintiff was not ready and willing to execute the said deed of settlement, in manner and form, &c.

5. As to the same parts of the declaration: That defendants were not requested by plaintiff to suffer or permit plaintiff to execute the said deed of settlement, in manner and form, &c.

Issues to the country were joined on all the pleas.

The cause was tried before Lord Campbell, C. J., at the Middlesex sittings after last Hilary Term. The material facts proved were stated by his Lordship, when delivering judgment in this Court on the after-mentioned motion, as follows.

"It appeared that this Company was provisionally registered in August, 1850: that in June, 1850, the plaintiff obtained certain scrip receipts for shares in the Company; that the deed of settlement was completed and executed by one-fourth of the shareholders on the 16th of August, 1851; that it contained a clause which authorized the directors to declare forfeited the shares of any scrip holders who should not execute the deed within three months from its date; that, after the expiration of three months from the date of the deed, and before the plaintiff requested that he might be permitted to execute the deed, the directors (a) declared his shares to be forfeited; that he had no previous *740] notice from the *Company to come in and sign the deed; (b) that the Company was completely registered in November, 1851; and that afterwards the Company refused leave to the plaintiff to execute the deed, on the ground that his shares were forfeited.

By the 6th and two other clauses of the deed it was provided:

"That the whole of such sum of 10s. per share shall be paid up within 21 days after the complete registration of the Company."

"That if any subscriber for shares in the capital of the Company shall not within the period of 21 days after the complete registration of the Company have paid the full amount of 10s. upon the shares subscribed for by him," (c) "it shall be lawful for the board of directors by a minute in writing under the common seal of the Company to declare that the share or shares in respect of which such full amount shall not have been paid," "and all the benefits and advantages whatsoever attending the same, shall thenceforth be forfeited to the Company; and upon such declaration the same shall be forfeited accordingly."

"That, notwithstanding the dates of the respective execution of these presents by the respective parties hereto, the contract intended to be

(a) By resolution of November 18th, confirmed on 21st.

(b) There was a notice in fact; but it was not given till November 15th, the day fixed for signing the deed being the 16th. See p. 740, post.

(c) The provision included also persons not paying instalments, to whom, however, a right of appeal was given.

effectuated by these presents shall be held to have commenced as" (sic) "and from the day and year first above written" (16th August, 1851, the date of the deed); "and that the share or shares of every subscriber for any part of the capital *of the Company who shall not execute these presents within three months from the day of the date here- [*741 of shall be forfeited if the board of directors shall think fit, and the amount paid upon such share or shares shall become the property of the Company."

It was contended on behalf of the defendants that, although no notice should have been given to execute the deed, the directors might, under the clause last above mentioned, declare the plaintiff's shares forfeited. A verdict was found for the plaintiff on all the issues, leave being reserved to move that a verdict for the defendants might be entered on the second and third.

Bramwell, in last Easter Term, moved that the verdict might be entered accordingly.—The defendant was not entitled to the shares, as he claims to have been on the second issue, if they were duly forfeited. Nor was he entitled to have a certificate of the shares, as he asserts on the third issue: that is the right of a shareholder, under stat. 7 & 8 Vict. c. 110, s. 51; and a "shareholder," by sect. 3, is a "person entitled to a share in a Company, and who has executed a deed of settlement." Notwithstanding the defective notice the shares were duly forfeited; for no notice at all was necessary. There is no person to whom the duty of giving it is assigned by the statute. The regulation, that shares shall be forfeited if the holder does not execute within three months, is not unreasonable; nor, indeed, does the plaintiff except to it; for he states that he was willing to sign the deed. The statute gives no appeal against such a deed, but there are securities against any unreasonableness in the clauses; for, first, it must (by sect. 7) be signed by one-fourth of the subscribers, and, *secondly, it must be [*742 approved by the Registrar of joint stock companies, whose jurisdiction, under sects. 7 & 8, appears by *The Banwen Iron Company v. Barnett*, 8 Com. B. 406 (E. C. L. R. vol. 65).

But, further, a verdict for the defendants ought to have been directed on the general issue. They are charged with a tortious act; that, in the case of a Company, must be the act of some person or persons representing them, and, to affect them, should have been authorized under seal. Here no such authority appears. [Lord CAMPBELL, C. J.—Could not a railway company be sued for a false imprisonment committed by their officers without a formal authority?] *Roe v. Birkenhead, &c., Junction Railway Company*, 7 Exch. 36,† is a case bearing on that point. [Lord CAMPBELL, C. J., referred to *Yarborough v. The Bank of England*, 16 East, 6; and *ERLE, J.*, mentioned *Hall v. The Mayor, &c., of Swansea*, 5 Q. B. 526 (E. C. L. R. vol. 48). *Bramwell* did not press this point further.]

Lastly, judgment ought to be arrested. The gist of the charge in the declaration is that the defendants would not permit the plaintiff to execute the deed of settlement. But a shareholder, by stat. 7 & 8 Vict. c. 110, s. 3, is a person who has executed the deed of settlement, "or a deed referring to it." The count does not show that the plaintiff might not have executed a deed so referring. [Lord CAMPBELL, C. J.—That would have been, substantially, signing the deed of settlement. ERLE, J.—A deed so referring would have been, in the sense of this statute, the deed of settlement. *Verba relata inesse videntur*. WIGHTMAN, J.—You might have shown that you allowed or would have allowed the plaintiff to sign a deed referring.]

*743] *A rule nisi was granted on the first point; refused on the two others. In this term, (a)

Edwin James, Paterson, and John Thompson showed cause.—The notice was clearly insufficient: and, assuming that the framers of the deed might make such a rule as the defendants rely upon for the purpose of forfeiting shares, it is to be inferred, even from the terms of the rule itself, that some reasonable notice was to be given. The directors have an option to exercise, and must make known how they propose to exercise it. This is determined, in principle, by *Vyse v. Wakefield*, 6 M. & W. 442.†(b) The Joint Stock Bank Act, 7 & 8 Vict. c. 113, s. 38, expressly requires that, before declaring any share forfeited, the directors shall give notice, and the course to be pursued is pointed out. [Lord CAMPBELL, C. J.—The Legislature expresses the intention in one instance and not in the other. CROMPTON, J.—The statute there gives the power to forfeit: here the directors give it to themselves. WIGHTMAN, J.—The clause seems not an unreasonable one. Lord CAMPBELL, C. J.—It forms part of a registered deed.] The deed cannot lawfully contain more than stat. 7 & 8 Vict. c. 110, authorizes. The framers of this forfeiting clause have exceeded the power given by sect. 7, which directs that the deed of settlement shall "make provision for such of the purposes set forth in schedule (A.) to this Act annexed as the nature and business of the Company may require." The only forfeiting clause authorized by the schedule (32) "for determining *744] whether, on *failure to pay any instalments or calls, the share shall or shall not be forfeited, and if forfeited, whether and on what conditions the property in such share may be recovered by the shareholder." The legitimate penalty appointed by the statute for not executing the deed is, by sect. 26, that "no shareholder" shall "be entitled to receive any dividends or profits, or be entitled to the remedies or powers hereby given to shareholders, until he shall have executed the deed." If, as this clause implies, there may be a shareholder

(a) April 29th; before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js. And May 5th; before the same Judges.

(b) Judgment affirmed in Exch. Ch., *Vyse v. Wakefield*, 7 M. & W. 126.†

who has not executed the deed, the shares cannot be absolutely forfeited by the non-execution. *The Banwen Iron Company v. Barnett*, 8 Com. B. 406 (E. C. L. R. vol. 65), cannot govern this case. It appears that the defendant there had signed the deed, and was probably one of the shareholders who concurred in getting it registered.^(a) But in *Ashpitel v. Sercombe*, 5 Exch. 147,† where the plaintiff had not executed the subscribers' agreement (having had an opportunity, but no notice to do so), it was held that, in an action to recover back his deposits, he might disclaim being bound by the deed, and contend that clauses in it were illegal. [Lord CAMPBELL, C. J.—The scrip here was issued before registration.] It was; and the deposits received; and the directors then register a deed by which the deposits are made forfeit if the scripholder will not subscribe unreasonable conditions. If the plaintiff was entitled to shares but for the forfeiture, it may be a question whether the forfeiture ought not to have been pleaded. [Lord CAMPBELL, C. J.—In what sense do you understand the word “shares?”] It is a division of the Company's stock. [Lord CAMPBELL, C. J.—Does that include scrip? And, assuming that to be so, was *the plaintiff entitled to any shares if the scrip was forfeited? WIGHTMAN, [*74£ J.—If the shares were forfeited he had no right to shares at the time of action brought.]

Bramwell and J. Gray, contra.—The question is, whether the Company had power to forfeit the shares. [Lord CAMPBELL, C. J.—And duly exercised it.] They were not bound by the deed to give notice: and the deed is not unreasonable in this respect. There is no allegation on the record that three months were not a reasonable time for signature; nor does anything appear in the case which can enable the Court to pronounce that the time allowed for that purpose was not reasonable. At all events the deed ought to be binding, after it has passed through the several checks provided by stat. 7 & 8 Vict. c. 110, s. 7, and has been executed by other shareholders, who would not perhaps have subscribed if the deed had been different, or if they had known that others would refuse. It would be highly inconvenient if shareholders might, for an indefinite time, reserve the power of objecting severally to particular clauses. And it is unjust that, while some have subscribed and thereby made themselves liable to executions, others should be allowed to lie by, for the purpose, it may be, of watching how far the project succeeded, and incur only the suspension of their dividends. The clause in question does not forfeit the shares absolutely, but gives a discretionary power to the directors. It cannot rationally be suggested that the small sums paid as deposits would induce them to insert or to act upon a clause of forfeiture. [Lord CAMPBELL, C. J.—The shares might be bearing a premium.] *Ashpitel v. Sercombe*, 5 Exch.

(a) See 8 Com. B. 431.

*746] 147,† *shows that it is the duty of a Company, receiving deposits, to prepare a reasonable deed upon which the undertaking may go on: but that, if they fail in doing so, the course open to the depositor is to bring an action, claiming a return of his deposit-money, or damages for breach of agreement. [Lord CAMPBELL, C. J.—Whom is he to sue?] The promoters of the undertaking. There is no other way in which a holder of scrip can legally canvass the propriety of the deed. [WIGHTMAN, J.—It is contended here that the Company could not prepare a deed with a clause of forfeiture; that it was *ultra vires*. CROMPTON, J.—Stat. 7 & 8 Vict. c. 110, s. 7, enables the Company to frame clauses for other purposes than those mentioned in Schedule (A), “not inconsistent with law.”] Those words mean something in the nature of an offence, a breach of some law. But that the regulation is harsh or arbitrary (which however is not admitted in the present case) is no ground for setting it aside, even in equity: Sparks v. Proprietors of Liverpool Waterworks, 13 Ves. 428.(a)

The complaint in this case, that the plaintiff was not suffered to execute the deed, is inconsistent, inasmuch as he contends that a part of it was void. He cannot allege that he was willing to sign, but would have disclaimed being bound by a particular clause. The deed is an entirety. [ERLE, J.—Suppose the Company had altogether expired, the plaintiff not having yet signed the deed.] That is not a correct test. If the Company are still going on, but have not prepared a regular deed, *747] *he must take his remedy by action against those whose duty it is to prepare it. In *Clements v. Todd*, 1 Exch. 268,† where the Company's scheme had proved abortive, and the plaintiff had obtained scrip certificates, undertaking to sign the subscribers' agreement and parliamentary contract when required, but had not signed either, it was held that he could not on that ground recover his deposit-money back. [CROMPTON, J.—If the party may repudiate such a deed as this, is not he also at liberty to come in and sign it? Lord CAMPBELL, C. J.—*Tale quale*.] The plaintiff ought to have done one act or the other. [Lord CAMPBELL, C. J.—You hold him bound by the deed but refuse to let him sign it.] Taking the deed as it is, the forfeiture is justified by it. Again, the plaintiff cannot maintain a claim to “shares” properly so called, since he could not be a “shareholder” according to stat. 7 & 8 Vict. c. 110, s. 8, without having executed the deed. [Lord CAMPBELL, C. J.—The rule to show cause was granted, substantially, upon the question of forfeiture.] *Cur. adv. vult.*

Lord CAMPBELL, C. J., in the ensuing vacation (June 18th), delivered the judgment of the Court.

(a) As to the obligation incumbent on a subscriber to ascertain and notice the contents of the deed which he has to execute, *Bramwell* cited a dictum of Parke, B., in *Mallalieu v. The Anglo-Californian Gold Mining Company*, at the Maidstone Spring Assizes in this year; not reported.

In this case a rule was granted on the point reserved, whether there was evidence to prove that, before the plaintiff requested that he might be permitted to execute the deed of settlement, his shares in the Company were duly forfeited? If they were, the defendants are entitled to have the verdict entered for them on the issue on the second plea, that the plaintiff was not possessed of the shares.

*It appeared, &c. (His Lordship here stated the facts of the [*748 case. See p. 739, ante.)

It was contended before us that this clause of forfeiture was unreasonable and void, and at any rate that it could not be acted upon against a subscriber or scripholder till he had had notice of it and had afterwards refused or neglected to execute the deed. But, looking at the provisions of stat. 7 & 8 Vict. c. 110, and the nature of the undertakings which that statute was meant to regulate, we think that the shares were duly forfeited. There is necessarily authority given by all the subscribers to frame a deed; the Company cannot act till it has a certificate of complete registration; and it cannot be completely registered unless it be "formed by some deed or writing under the hands and seals of the shareholders therein," which "must be signed by at least one-fourth in number of the persons who at the date of the deed have become subscribers." (a) This deed must likewise be submitted to the registrar of joint stock companies, that it may be seen by him to be conformable to the statute and in other respects unexceptionable. He may object that it is incomplete, or that it contains improper matter; and he must approve of it before the certificate of complete registration can issue. We conceive that no subscriber can ask to be allowed to execute the deed, and at the same time object to its contents. In the case of *Wilkinson v. Anglo-Californian Gold Mining Company*, ante, p. 728, we lately held that a subscriber could not partially execute a deed of settlement, excepting clauses which he objected to. If he executes it absolutely, he must be bound by it in as far as it is not *against the law of the land. This is an action for not being [*749 permitted to execute the deed; and the plaintiff must be supposed to have availed himself of his opportunities of becoming acquainted with its contents, and to have sanctioned it as it stands. If the deed contained anything contrary to the prospectus, or justly objectionable, he might possibly recover back the sums he has paid for his scrip from the individuals with whom he dealt: but in the action against the Company for not permitting him to execute the deed he cannot object to it as unreasonable.

Then, as to the want of notice. The evidence was that he had no notice till the day before the time expired, which the jury found not to be sufficient; and the case stands as if he had received no notice. But no notice is required to be given by the deed, which confers upon the

(a) Sect. 7.

directors the absolute power to declare forfeited the shares of the subscribers who do not execute it within three months from its date. Therefore, if the deed be valid, no notice was required. In truth the subscribers had ample means of becoming acquainted with the peril which they ran of their shares being forfeited: but some of them may have delayed their application to execute the deed (an act which would render them liable for calls), till they saw that the concern was likely to be prosperous and that shares were at a premium.

In this action we thought that the plaintiff's title to *shares*, in the sense in which the word is used in the declaration, could not be denied on the ground that he has not executed the deed and therefore could not be a shareholder within the definition of the term in the interpretation clause: but, as the shares were duly *forfeited, the verdict on the

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second issue will be entered for the defendants.

Rule absolute.

The rule, as drawn up, was to enter a verdict for the defendants on the second issue. A rule nisi was afterwards obtained to amend the rule made on June 18th, by ordering a verdict to be entered for the defendants on the third issue as well as the second; and to make corresponding amendments in the *postea* and all subsequent proceedings.

In Michaelmas Term (November 25th), 1852, *Edwin James* and *Patteson* showed cause, and *Bramwell* and *J. Gray* supported the rule. [Lord CAMPBELL, C. J.—The Court deliberately considered the question whether or not the forfeiture was duly made, and we held that it was. All the legal consequences must follow. The intention of the Court is clear. We could not think the plaintiff entitled to certificates if the shares were forfeited.]

Per Curiam, (a)

Rule absolute, to amend rule and *postea*, &c.

(a) Lord Campbell, C. J., Coleridge, Wightman, and Erie, Ja.

*751]

*Ex parte ROSE, D. D. June 7.

Where a beneficed clergyman charged with an offence by report of Commissioners under sect. 5 of the Church Discipline Act, 3 & 4 Vict. c. 86, consents, under sect. 6, to abide the judgment of the Bishop without further proceedings, and is thereupon sentenced to suspension from the functions and emoluments of his office for a term of years, the Bishop may lawfully make it a part of such sentence that, when the term expires, the suspended party shall produce a certificate of his good behaviour during such term, under the hands of three beneficed clergymen in his vicinity, such certificate to be approved of by the Bishop before the suspension be taken off; and that the suspension shall continue, notwithstanding the expiration of the term, until such approval.

SIR A. J. E. COCKBURN, Attorney-General, moved that a writ of prohibition might issue, to prohibit the Lord Bishop of Oxford from proceeding in execution of the after-mentioned sentence against Dr. Rose, who stated the following facts on affidavit.

Dr. Rose was incumbent of the rectories of Woughton and Little Woolston, both in Buckinghamshire. In November, 1848, a report was circulated that he had been guilty of adultery; and Dr. Rose thereupon prayed the Bishop of Oxford, in whose diocese the livings were, to order a commission of inquiry under the Church Discipline Act, 3 & 4 Vict. c. 86, s. 3. The Bishop assented; and a commission was issued, Dr. Rose undertaking (on the requisition of the Bishop's secretary) to guaranty the Bishop against all costs. The Commissioners reported to the Bishop that there was *prima facie* ground for instituting proceedings against Dr. Rose; and thereupon Dr. Rose, after an interview and correspondence with the Bishop, consented, on his Lordship's suggestion, that sentence should be pronounced, under sect. 6 of the statute, without further proceedings. Dr. Rose at the same time made a protestation of his innocence, which he now repeated on affidavit. The Bishop, on March 4th, 1849, sequestered Dr. Rose's livings, and issued a decree of suspension, whereby, *after reciting the Commissioners' report, his [752 Lordship decreed.

"That for the conduct aforesaid he the said Francis Rose ought to be suspended for three years from all discharge and function of his clerical offices and the execution thereof: that is to say, from preaching the word of God, administering the Sacraments, and performing all other duties and offices in the respective parish churches and parishes of Woughton on the Green and Little Woolston aforesaid, and elsewhere within our diocese of Oxford aforesaid; and from receiving any of the profits and benefits of the said rectories or benefices; that is to say, from receiving and taking the fruits, tithes, rents," &c. "And we do suspend him the said F. Rose accordingly. And we do condemn him in the costs incurred and to be incurred in the said proceedings: And we do order and direct that, at the expiration of the said three years, the said F. Rose do and shall exhibit and leave in the registry of our Court a certificate under the hands of three beneficed clergymen in his vicinity, of his good behaviour and morals during the said term of his suspension; and that the said certificate be approved of by us before such suspension be relaxed or taken off: And that the said suspension shall continue in full force, notwithstanding the expiration of the said term of three years, until the aforesaid certificate shall be so exhibited and approved of."

When the three years had expired (March, 1852), Dr. Rose left at the registry of the diocese a certificate signed by three clergymen stating "That the Rev. Francis Rose, clerk, D. D.," &c., "hath during the three years now last past resided at Woughton in our vicinity, and hath continued to be during such time as aforesaid of good behaviour and *morals." The Bishop considered the testimony of two of the [753 certifying clergymen unsatisfactory, for reasons which he as- signed; and he refused to accept the certificate as a compliance with his

decree. Further attestations were offered, but were also deemed insufficient; and the suspension was continued, the Bishop offering, upon terms specified, to allow Dr. Rose the surplus income of the livings after paying curates and other necessary expenses. The affidavit contained statements controverting the Bishop's objections, and represented that, if they prevailed, it would be impossible for the deponent to procure a certificate duly attested, inasmuch as the neighbouring parishes of which the incumbents had not been excepted to had been without resident incumbents during the whole of the last three years.

Sir *A. J. E. Cockburn* now contended that the sentence was illegal, as it made Dr. Rose's restoration to his livings depend upon a condition which might render the suspension perpetual. [Lord CAMPBELL, C. J.—A Court of common law imprisons till a certain time and till sureties are found. COLERIDGE, J.—The sentence here might have been deprivation.] Still, if the Bishop chooses to punish by suspension, it must be conformably to the rules of ecclesiastical law. By stat. 3 & 4 Vict. c. 86, s. 6, the sentence given by consent is not to exceed that which might be pronounced in due course of law. In *Watson v. Thorp*, 1 Phillim. Ecc. Rep. 269, 279, note (a), a sentence like the present (pronounced in Court) was affirmed by the Court of Delegates: but "the Court doubted as to the requiring the certificate; and also as to its being required that the certificate should be approved of by the Judge; *754] considering, *however, that if the certificate when offered should be rejected, it would be an appealable act, it affirmed the sentence of the Courts below on these, as well as on the other points." In the present case there can be no appeal. [COLERIDGE, J.—That is your own doing. Lord CAMPBELL, C. J.—The Bishop might have deprived; might not he therefore suspend for any period, however long? Not for an indefinite time. [COLERIDGE, J.—Is the Bishop bound to receive any certificate that may be offered?] He cannot demand one at all. If the suspended party has been living irregularly since the sentence, he may still be tried, and deprived if convicted. [Lord CAMPBELL, C. J.—In *O'Connell v. The Queen*, 11 Cl. & Fin. 155, 214, 232, 251, a judgment that the defendants should enter into recognisances to keep the peace, and for good behaviour for the space of seven years next ensuing the acknowledgment thereof, was objected to because no period was fixed from which the seven years must run, and the judgment therefore might have amounted to a sentence of perpetual imprisonment, which the Court had no power to inflict. But here the clerk might have been sentenced to perpetual deprivation. The sentence actually given is a mild one; and the conditions seem reasonable, unless you can show that no certificate could be required.] Where the sentence is with a view to punishment it must be definitive, not leaving an uncertainty whether it be temporary or final. That would be so if

the sentence were pronounced in Court; and the Bishop cannot exercise a wider jurisdiction when acting under stat. 3 & 4 Vict. c. 86, s. 6.

Lord CAMPBELL, C. J.—There is no ground for this *motion. [755 We must consider Dr. Rose as guilty on this charge. A *prima facie* case is reported against him. He acknowledges himself guilty; or at all events he submits to sentence. That sentence does not exceed the judgment which might have passed if he had been convicted in course of law, and which might have been deprivation. The punishment itself is not unreasonable. But then the Bishop allows the suspension to terminate at the end of three years, on condition that Dr. Rose produce a certificate by three clergymen, such certificate to be approved by the Bishop. Does that exceed the sentence “which might be pronounced in due course of law?” I think not, and that the condition is most reasonable. It leaves a *locus poenitentiae* at the end of three years: the punishment might have been a severer and a final one. I think the power which has been exercised by the Bishop belongs to him; and no authority has been shown to the contrary. It was exercised in *Watson v. Thorp*, 1 Phillim. Ecc. Rep. 269; and the doubt intimated there is not a decision. The power, in my opinion, exists, and has been wisely exerted.

COLERIDGE, J.—It appears by the books of ecclesiastical law that offences may be punished by suspension *ab officio* or a *beneficio*, or *ab officio et beneficio* jointly, which are temporary deprivations; or by deprivation for ever: the sentences are *ejusdem generis*. Here the Bishop has not thought proper to deprive; but he has imposed a reasonable condition, not in *pœnam* merely, but with a view to reformation. Is the suspended party to be readmitted at the end of three years without any information to the Bishop? If any is to be required, [756 *the Bishop must have a discretion as to the persons in whose information he shall place confidence. This appears to me quite reasonable; and no authority is stated to the contrary. The doubt intimated in the note to *Watson v. Thorp*, 1 Phillim. Ecc. Rep. 279, note (a), is not, in my mind, of any weight. It is true there can be no appeal; but, if a party submits to the course allowed by sects. 3 and 6 of the Act, he knows that he takes his case out of the general rule of procedure.

ERLE, J.—The only question before us is, whether or not the Court below is exceeding its jurisdiction. I am willing to give Dr. Rose credit as to the matters sworn by him respecting the charge itself. But, the report having been made against him, he submitted to the course of proceeding directed by sects. 3 and 5. On a proceeding in ordinary course, a sentence of deprivation might have been pronounced: the only question here is whether a judgment has actually been given “exceeding the sentence which might be pronounced in due course of law”: and to that we must answer in the negative.

CROMPTON, J.—Nothing has been stated to show that this sentence

exceeds the jurisdiction. From the ecclesiastical authorities it is clear that there may be a suspension with conditions: and I think the condition here was reasonable. Rule refused

The QUEEN v. SILL. *June 7.*

See 1 E. & B. 553, note (a) (E. C. L. R. vol. 72).

*757] *GOODWIN v. CREMER. *June 8.*

To an action by endorsee of a bill of exchange against acceptor, defendant pleaded that *per darrein continuance*, an earlier endorser had paid to plaintiff, then being holder, and plaintiff accepted the full amount of the bill, and all interest thereon, in full satisfaction and discharge of the bill and all moneys due in respect thereof (not mentioning damages or costs). Held, on demurrer, a bad plea.

ASSUMPSIT. The declaration stated that, before the commencement of this suit, to wit, on, &c., one William Webb Ogbourne made his bill of exchange in writing, and directed it to defendant, and thereby required him to pay to the order of the said W. W. Ogbourne, 49*l.* 6*s.*, at three months after the date thereof, which period had elapsed, and the said bill had become due, before the commencement of this suit; that defendant accepted the said bill, and the said W. W. Ogbourne then endorsed the same to one William Thorne, who then endorsed the same to plaintiff; of all which defendant had notice, and then promised plaintiff to pay him the amount of the said bill according to the tenor thereof, and of the said acceptance and endorsement. Breach, non-payment.

Pleas: 1. That defendant did not accept. Issue thereon. 2. That, after the pleading of the last plea, and before this day, &c., and after the said bill of exchange became due, to wit, on, &c., the said W. Thorne in the declaration mentioned paid to plaintiff, then being the holder of the said bill, and entitled to receive the proceeds thereof, and plaintiff accepted and received from the said W. Thorne, 60*l.*, the full amount of the said bill and all interest thereon, in full satisfaction and discharge of the said bill, and of all moneys due and payable on account and in respect thereof.

*758] *Demurrer and joinder. The plaintiff's points were: that the plea showed no sufficient satisfaction of the causes of action in the declaration; that it showed no sufficient satisfaction of the damages and costs; and that, consistently with the plea, the plaintiff might be suing as trustee for W. Thorne.

T. Jones, for the plaintiff.—The plea is bad in form and substance. Payment of a bill of exchange by an endorser is no satisfaction of it on

the part of the acceptor; *Callow v. Lawrence*, 3 M. & S. 95 (E. C. L. R. vol. 30). [Lord CAMPBELL, C. J.—*Primâ facie*, the party who has received the money in satisfaction of the bill cannot afterwards sue the acceptor.] He can, unless the payment has been made to him on behalf of the acceptor. And the plea contains no such allegation. *Jones v. Broadhurst*, 9 Com. B. 173 (E. C. L. R. vol. 67), is directly in point. [ERLE, J.—According to your argument, if the drawer or endorsee had allowed the amount of the bill, paid to him by a third party, in an account with the acceptor, the acceptor would still be liable to him upon the bill itself.] The endorsee might sue, and he may possibly be suing here, as trustee for another party to the bill. *Randall v. Moon*, 12 Com. B. 261 (E. C. L. R. vol. 74), decides that even an accommodation acceptor is not discharged from his liability to an endorsee, by another person paying the amount of the bill to such endorsee, after the commencement of the action, if the endorsee did not know that the acceptance was for accommodation. [Lord CAMPBELL, C. J.—If the plea had alleged that the payment was made in satisfaction of the causes of action in the declaration mentioned, would it have been good?] *It would not; for it would allege no satisfaction as regards costs. The [*759 plaintiff may be compelled to bring actions against several parties to the bill; and it would be very unjust if payment to him, even of the costs as well as the debt, by one of these parties, were to deprive him of his right to costs from any of the others.

Montague Smith, *contrâ*.—The plea is good. [COLERIDGE, J.—I certainly doubt if it can be supported in its present form.] It amounts to a plea of release. If the plaintiff choose to receive the amount of the bill from some person, other than the acceptor, in satisfaction of the bill, that is a release of all causes of action. [Lord CAMPBELL, C. J.—The plea states that the payment was made, not in satisfaction and discharge of all damages and costs, but only of the bill and all moneys payable in respect thereof.] The plea might probably be amended as to that. In *Beaumont v. Greathead*, 2 Com. B. 494 (E. C. L. R. vol. 52), where the defendant was sued on a joint and several promissory note made by himself and two other persons, it was held that a plea of payment by the defendant was supported by proof of payment by one of those two other parties. [COLERIDGE, J.—There the plea stated that the payment was made in discharge of the debt *and damages* in the declaration mentioned.] The declaration there did not mention costs; yet the plea was held to be good by way of bar to the action generally. [ERLE, J.—But the plea alleged payment before action brought; so that the question as to costs did not arise.] It was not necessary to allege, in the present case, that the payment was accepted in discharge of costs. In *Thame v. Boast*, 12 Q. B. 808 (E. C. L. R. vol. 64), it was held that, after the acceptance by the plaintiff of [*760 a sum of money in satisfaction of the debt, he could proceed only

for nominal damages, and therefore had no claim in respect of costs. As to the argument that a plaintiff may have to bring actions against the several parties to a bill, the answer is, that, if he chooses to do so, he must run the risk of losing the costs of one action if he succeeds in another; *Bailey v. Haines*, 15 Q. B. 533 (E. C. L. R. vol. 69). On the other hand the plaintiff, after a good plea puis darrein continuance, may discontinue without payment of costs; *Wollen v. Smith*, 9 A. & E. 505 (E. C. L. R. vol. 36).

Lord CAMPBELL, C. J.—It is unnecessary to consider what our judgment would have been if the plea here had been the same as that in *Jones v. Broadhurst*, 9 Com. B. 173 (E. C. L. R. vol. 67), or in *Thame v. Boast*: this plea differs entirely from the pleas in those actions. This is an action by an endorsee against an acceptor, in which damages might be recoverable beyond the amount of the bill. But the plea does not allege that what the plaintiff received was in satisfaction of damages or costs. It is an experiment which the acceptor tries, upon finding that the endorser has been called on to pay as well as himself, to stop the action against himself without payment of costs. The holder is entitled to sue the acceptor and all the endorsers in separate actions; and each action must go on till it is brought to its proper termination, or stopped upon payment of costs in that action. The case is very different from that of several parties who have joined in a single contract.

COLERIDGE, J., concurred.

*ERLE, J.—The plea here pleaded puis darrein continuance, *761] in what we may assume to be one of several actions, sets up payment of debt and interest in another action as an answer to this. It is established law, and good sense, that a plaintiff may continue his action till his claim for costs is satisfied: in assumpsit, he may sue for a breach of contract where only nominal damages are recoverable. *Beaumont v. Greathead* was an action of debt; and it is difficult to say how, after the payment of the debt, an action could lie for the mere non-payment of such debt. If the principal and interest were paid and received, a second action of debt for the same debt could not be sustained. In *Thame v. Boast* the plea puis darrein continuance showed satisfaction of the promise, damages, and costs; and this was established in proof to the satisfaction of the jury.

(CROMPTON, J., was absent.)

Judgment for plaintiff.

The QUEEN v. The Inhabitants of DENTON. *June 9.*

By Act of parliament, the liability to repair certain highways in a parish was taken from the parish and cast upon certain townships in which the highways respectively were; and the Act gave a form of indictment against such townships for non-repair, which would have been insufficient at common law. One of the townships was indicted under the Act, but, before trial, the Act was repealed without any reference to depending prosecutions. The Court arrested a judgment given against the township on such indictment.

Quære whether, on indictment against inhabitants of a district, charging them with liability to repair a highway out of the district, it is necessary to prove a specific consideration for such liability; or whether consideration is to be inferred from the fact of repair, without other evidence.

A BILL of indictment was found against the above defendants at the Salford April Sessions, 1851, for non-repair of a horse and carriage way at the township of Denton in the parish of Manchester.

*The first count charged the inhabitants of the township of Denton as having been accustomed to repair, and alleged that [*762 they ought to repair, all highways within that township which would otherwise have been repairable by the parish; of which highways this was stated to be one: the second count charged them, generally, as having been accustomed to repair this highway, and alleged that they of right ought to repair it.

The third count stated the highway to be in the township of Denton, and alleged the liability of defendants as follows. And the jurors, &c., further present: "That the said highway in this count mentioned is not a highway in respect whereof certain proceedings mentioned in an Act of parliament passed on the 8th day of April, A. D. 1819, to wit, an Act entitled 'An Act for providing that the several highways within the parish of Manchester, in the county palatine of Lancaster, shall be repaired by the inhabitants of the respective townships within which the same are situate,' or any of the said proceedings, have been had, or in respect whereof certain verdicts in the said Act of parliament mentioned or any of them have been given, or in respect whereof any verdict had before the passing of the said Act of parliament been obtained against the inhabitants of the parish of Manchester aforesaid at large: and that the inhabitants of the township of Denton aforesaid in the county of Lancaster aforesaid ought to repair and amend the said part of the said highway in this count mentioned, and so being in decay as last aforesaid, when and so often as it shall be necessary."

The fourth count alleged that the highway was in the township of Denton, and that the inhabitants of the said township ought to repair the said part of the said *highway, &c., so being in decay, &c., [*768 when and so often as it shall be necessary.

Plea (of January 29th, 1852): Not Guilty.

Stat. 59 G. 3, c. xxii., local and personal, public, the Act above referred to, recited (sect. 1): That the parish of Manchester was 52 miles in circumference and contained a population of 140,000 inhabit-

ants, and consisted of 29 townships, two of which were Denton and Haughton : That the townships (with exceptions not material) had always had surveyors, and none had been appointed for the parish : That, until 1781, the said townships had always repaired their own highways (except turnpike roads and roads repairable *ratione tenuræ*, and with some other exceptions not material), by a custom which might have been pleaded to an indictment against the parish : That, in 1781 and in subsequent years down to 1809 inclusive, a presentment was made and indictments were found (as the recital more particularly specified) against the parish for not repairing highways situate in certain of the townships ; and, the inhabitants of the parish pleading Not Guilty, verdicts and judgments passed against them : That the inhabitants were not then aware that they might allege in defence a custom for the inhabitants of townships to repair all highways generally within such townships : but it had been lately determined^(a) that a township might be charged, by reason of custom, with the repair of all highways therein, without showing a custom to repair the particular highway in question. And the clause then, after some further recitals, enacted : " That from *764] and after the passing of this Act no indictment, *presentment, or other prosecution shall be commenced, had, or prosecuted against the inhabitants of the said parish for the neglect or omission to repair or maintain any highway, footway, or bridleway within the same parish ; and that the said inhabitants shall not be in anywise charged with or liable to the reparation of any highways ; the several highways in respect of which such presentment hath been made, and such indictments have been preferred, and such verdicts had and obtained as aforesaid, and any other highways in respect of which any verdicts may have heretofore been given against the inhabitants of the parish at large, if any such there be, only excepted, which said last-mentioned highways shall continue to be repaired by and at the expense of the inhabitants at large of the said parish, in as full, large, and ample a manner as they are liable to the maintenance and reparation of the same at the time of the passing of this Act."

Sect. 3 enacted : " That the inhabitants of the several townships within the said parish shall be liable to repair and amend all highways within such townships respectively, as fully and completely as the inhabitants of every parish, by the laws of this realm, are liable to repair the several highways within the same (except such highways in respect whereof the said several proceedings have been had, and the said verdicts have been given as aforesaid, and any other highway in respect whereof any verdict hath heretofore been obtained against the inhabitants at large of the said parish, if any such there be, and except" ; another exception, not material).

Sect. 4 enacted : " That on any indictment, presentment, or other

(a) See *Rex v. Ecclesfield*, 1 B. & Ald. 348.

proceeding against the inhabitants of any of the said townships for not repairing any highway, *bridleway, or footway within any such township, it shall be sufficient to allege generally, that the inhabitants of such township ought to repair and amend such highway, bridleway, or footway, without setting forth any custom or prescription for that purpose, or referring to the authority of this Act.” [*765]

On the trial of this indictment, before Cresswell, J., at the last Spring Assizes at Liverpool, evidence was given to show that the highway was locally within Denton: but it was alleged in defence that Haughton was liable to the repair; (a) and it was proved that, in fact, the way had, for many years past, been repaired by Haughton. On the other side it was contended that, if the way was in Denton, liability to repair it could not be fixed on the inhabitants of Haughton without showing some consideration for repair by them: and no evidence of this kind was given. The learned Judge thought that the only question upon which there was evidence for the jury was, whether or not the highway was in Denton; and a verdict was found for the Crown; leave being reserved to move that a verdict might be entered for the defendants.

Knowles, in last Easter term, moved accordingly, and contended that the fact of repair continued from a distant time was in itself evidence of a consideration. He also moved in arrest of judgment on the following ground.

After the finding of the bill, and before plea pleaded, stat. 14 & 15 Vict. c. x., local and personal, public, was passed (Royal assent, 20th May, 1851), “for relief to the several townships in the parish of Manchester from the repair of highways not situate within such townships respectively.” By that Act, sect. 1, stat. 59 G. 3, c. xxii. *is [*766] repealed. By sect. 2 it is “provided nevertheless, that all contracts and engagements legally entered into up to the passing of this Act, under and by virtue of the said Act, shall be completed, paid for, and discharged out of the moneys to be raised by virtue of the said Act:” but nothing is said as to prosecution or discontinuance of legal proceedings. Sect. 3 enacts: “That from and after the passing of this Act all and every the highways within the said parish (except such highways as for the time being may be by law repairable by trustees of turnpike roads, or by individuals liable to the reparation thereof ratione tenuræ or by reason of any other special or particular cause or objection(b)) shall be repaired by the particular township in the said parish in which such highways shall be situate; and the inhabitants of the said parish of Manchester, as such parishioners, shall be entirely freed and discharged from any obligation or liability to repair the same or any part or parts thereof.”

Knowles contended that, after these enactments, the indictment, so

(a) See *Regina v. Haughton*, 1 E. & B. 501 (E. C. L. R. vol. 72).

(b) *Sic*. Probably a misprint for “obligation.”

far as it depended on the statute of 59 G. 3 for its validity, could no longer be sustained; and he cited *Regina v. Mawgan*, 8 A. & E. 496 (E. C. L. R. vol. 35). A rule nisi was granted on both points.

Atherton and *J. A. Russell* now showed cause.—First; the defendants could not discharge themselves of the liability and cast it upon Haughton without showing a consideration of some kind for which Haughton had become bound to repair, the highway not lying within that district; note (o) to *Rex v. Stoughton*, 2 Wms. Saund. 158 b, 6th ed.; and *Rex v. Ecclesfield*, 1 B. & Ald. 348, there cited. *Rex v. St. *767* Giles, *Cambridge, 5 M. & S. 260, and *Rex v. Machynlleth*, 2 B. & C. 166 (E. C. L. R. vol. 9), show that, where parties are charged on the record with repairs out of their district, the record must show a specific consideration; and, if this is material in point of allegation, it is so in point of proof. If a consideration might be presumed from the mere fact of having repaired, the plea and indictment which were held bad in the two last cited cases would have been sufficient. And it may be asked, if the repair is evidence of a consideration, what consideration does it prove? [Lord CAMPBELL, C. J.—What question went to the jury on this point?] None. [COLERIDGE, J.—If a consideration had been alleged, would not the usage have been some evidence of it? In the case of an easement, user is deemed evidence of some grant. Lord CAMPBELL, C. J.—What actual consideration should you expect for the repair, by one district, of roads in another?] The township charged might receive some especial benefit from the existence of such roads. It might be a matter of bargain. At all events it is for those who lay the charge to account for the liability. [Lord CAMPBELL, C. J.—The most we could now say is that, if the matter had gone to the jury, they might have thought that the usage arose from a legal liability.] The learned Judge held that the mere repair was no evidence for the jury: nor could it be, because such a fact does not point to any specific consideration.

Assuming the first two counts not to be maintainable, the prosecutors may abandon these and rely upon the third count, which is good, under stat. 59 G. 3, c. xxii., notwithstanding the repeal. Its form is directly sanctioned by the statute: the fact of which it complains was *768] an offence; and the character of that offence is not altered by the repeal of the Act. Nothing is changed by the repeal but matter of form. [Lord CAMPBELL, C. J.—It is difficult in such a case to distinguish form from substance.] In *Regina v. Mawgan*, 8 A. & E. 496 (E. C. L. R. vol. 28), the alteration was in substance. [Lord CAMPBELL, C. J.—In the matter of procedure.] A magistrate had presented a highway. The jurisdiction to present was gone before the presentment could be tried; stat. 13 G. 3, c. 78, s. 24, being repealed by stat. 5 & 6 W. 4, c. 50, s. 1, this Court could no longer act upon a presentment; and therefore it arrested the judgment. By the repealed

statute, a justice of peace had been substituted for the original tribunal of a grand jury; the repealing act took away the substituted authority and the power to enforce it. Here no such change is made: only an indictment since the last Act must be in a different form. [COLERIDGE, J.—Can it be said that the difference in the pleading would be mere form?] Stat. 14 & 15 Vict. c. 100, gives directions (as in sects. 4, 5, 8) for simplifying the form of indictments by omitting certain details: would an indictment so framed become bad, if the Act were repealed before trial? [Lord CAMPBELL, C. J.—Supposing the Act simply repealed, the illustration is *idem per idem*. COLERIDGE, J., referred to *Surtees v. Ellison*, 9 B. & C. 750 (E. C. L. R. vol. 17).^(a)] The expression of Lord Tenterden there, that the repealed Act must be considered as if it had never existed, went further than was necessary. And the question was, whether a commission under stat. 6 G. 4, c. 16, could issue against a person who had ceased trading before the Act passed; the older bankrupt laws being repealed by that statute. The language of stat. 6 G. 4, c. 16, s. 2, was, that all *persons “*using the*” [*769 trade of merchandise,” &c. (not “*having used*”), should be deemed traders liable to become bankrupt. That required a trading contemporaneous with the Act. [Lord CAMPBELL, C. J.—The principle is that, after the repeal of a statute, what has been done under it is valid, but you cannot any longer make use of that statute. Here, if a judgment had been given under the former Act, it could not be reversed.] In *Hitchcock v. Way*, 6 A. & E. 943 (E. C. L. R. vol. 83), where a statute passed altering the law (as to gambling securities) while the action was pending, Lord Denman, C. J., delivering the judgment of the Court, said: “We are of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relation of litigant parties to each other.” The same principle was acted upon by the majority of the Court of Exchequer in *Moon v. Durden*, 2 Exch. 22.† The maxim recognised in both these cases was “*Nova constitutio futuris formam imponere debet, non præteritis*,” 2 Inst. 292. [COLERIDGE, J.—In *Rex v. McKenzie*, Russ. & Ry. 429, the indictment was for stealing privately in a shop to the value of five shillings, which, by stat. 10 & 11 W. 3, c. 23, s. 1, was felony without benefit of clergy. After the commission of the felony, and before conviction, that enactment was repealed by stat. 1 G. 4, c. 117, which made the offence punishable by transportation or imprisonment: and the Judges held that sentence could not be passed under either statute.] Here the repealing Act alters nothing but the mode of charging an offence which continues in all respects the same.

*Lord CAMPBELL, C. J., then asked the defendants' counsel if they would be satisfied with a rule to arrest the judgment; [*770

(a) *Kay v. Goodwin*, 6 Bing. 576 (E. C. L. R. vol. 19), was also mentioned.

observing that the rule could not be made absolute to enter a verdict for the defendants, but must be, at most, for a new trial only, the entire case not having gone to the jury. His Lordship's suggestion being assented to,

Knowles (with whom was *Cowling*), in support of the rule, was not heard.

Lord CAMPBELL, C. J.—The judgment must be arrested. It is admitted that the third count is bad but for the repealed statute. Then we are called upon at this period to do something; to pronounce a judgment. Can we do so upon a count which has no validity except by a statute which was repealed before our judgment was prayed for? The general rule is that a statute, from the time when it is repealed, can no longer be acted upon. The Court was governed by that rule in *Regina v. Mawgan*, 8 A. & E. 496 (E. C. L. R. vol. 35), which cannot be distinguished from this case: and no attempt was made there to assert the difference which is now suggested between form and substance. I think the effect of a repeal is the same whether the alteration affect procedure only or matter which is more of substance: had this been otherwise, the Court must have decided differently in *Regina v. Mawgan*. By arresting the judgment we are not giving the statute any retrospective operation: we allow it force only from the time when it passes: and we say that, if the count was bad then, it cannot be acted upon now.

*771] *COLERIDGE, J.—The case has been treated as if depending merely on the authorities which were cited: but if this were res integra, I think we must come to the conclusion which was arrived at in those instances. The proceedings are before the Court, and are at a stage when the question arises whether a particular step can be justified. It can be justified only by an Act of parliament; and that Act is repealed without any saving. Then, can the Court for the present purpose take notice of the repealed Act? The answer is that what has been done and perfected cannot be disturbed; but if you want assistance from the statute for a further purpose, as that of giving judgment, you cannot now have it. Lord Tenterden says, in *Surtees v. Ellison*, 9 B. & C. 752 (E. C. L. R. vol. 17): "It has been long established, that, when an Act of parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed." Nothing can be more conclusive. In *Rex v. McKenzie*, Russ. & Ry. 429, all the Judges agreed that sentence could not be passed under the new Act, which was prospective only. Wood, B., and Park, J., at first doubted whether the prior Act must not be considered in force for the trial and punishment of offences actually committed before its repeal; a suggestion like that which has been maintained before us to-day. But the rest of the Judges differed; and the two afterwards acceded to their opinion.

ERLE, J.—The repealed statute is, with regard to any further operation, as if it had never existed. It gave a form of proceeding which has been followed in this *indictment; and the defendants were not liable except under the statute. Between the indictment [*772 and the judgment this statute is repealed. To say that the proceedings may nevertheless be followed up contravenes the sense of the word “repeal.” It is contended that the change affects nothing more than form: but the liability in fact on which the third count is framed is a liability created by the statute. It is as if the indictment had expressly alleged, as the ground for charging the defendants, that they were liable by virtue of stat. 59 G. 3, c. xxii. The repeal takes away that ground, and makes the indictment bad in the substance as well as in form.

CROMPTON, J.—We cannot look to a statute repealed since the indictment was preferred, for the purpose of giving judgment. The case is stronger than *Regina v. Mawgan*, 8 A. & E. 496 (E. C. L. R. vol. 35); for here some ingredients of a common law liability are wanting, and the defect is supplied only by the statute.

Judgment arrested on the third count.

***The QUEEN v. SCAIFE and Others. June 10. [*773**

A Judge of any of the three superior common law Courts has jurisdiction to make an order for the issuing of a procedendo, to send back proceedings on an indictment for felony, removed by certiorari from an inferior Court: and it rests in his discretion whether such order should be made upon a summons to show cause, or immediately.

IN this case an indictment for robbery from the person, with violence, had been found at the Hull Borough Sessions, and quashed for informality by the Recorder, after the case had been partly tried. Another bill was preferred and found at the next Sessions, removed by certiorari into this Court, and tried at the York Spring Assizes, 1851, before Cresswell, J., at Nisi Prius, when a verdict of guilty was returned. A rule for a new trial was made absolute, in Trinity Term, 1851; (a) and the case was sent to York, for trial before Platt, B., at the Summer Assizes, 1851. The learned Judge postponed the trial, at the instance of the prosecutor, till the next Assizes.

At the last Spring Assizes, before Alderson, B., the prisoners applied to be tried: but the learned Judge, finding that the record was not sealed, refused to try. The prosecutor, without informing the prisoners, applied to Pollock, C. B., at Chambers, and obtained an order for a writ of procedendo, under which the case was sent back to the Hull Quarter Sessions. An application was then made, on behalf of the prisoners, to postpone the trial, on the ground that there had not been

(a) See *Regina v. Scaife*, 17 Q. B. 238 (E. C. L. R. vol. 79).

time to prepare the defence; but the Recorder refused to postpone; and the prisoners were convicted and sentenced to ten years' transportation.

*774] *Dearsley* now moved for a rule to show cause why the **procedendo* and all subsequent proceedings should not be set aside.

First: where any indictment has been removed from an inferior jurisdiction into this Court, and become a matter of record here, it cannot, by the common law, be sent back; 4 Inst. 73. It is true that, in *Rex v. Wakefield*, 1 Burr. 485, the Court ordered a *certiorari* to be superseded, and the return taken off the file; but the reason assigned was, "*quia improvidè emanavit.*" A *procedendo* cannot be moved for until the *certiorari* be taken off the file; *Rex v. Clace*, 4 Burr. 2456, 2459.

Next, although, by stat. 6 H. 8, c. 6, the Judges of this Court, and therefore, since stat. 1 & 2 Vict. c. 45, s. 1, the Judges of the Exchequer and Common Pleas also, have power to send back indictments for felony, that power can be exercised only by the full Court, and not by a single Judge at Chambers. Stat. 6 H. 8, c. 6, gives the power expressly to "the justices of the King's Bench;" and, where a statute expressly directs proceedings to be taken by the full Court, a single Judge cannot interfere; *Morgan v. Lute*, 1 Chitty's Rep. 381, *Shaw v. Roberts*, 2 Dowl. P. C. 25, *Jones v. Fitzaddams*, 2 Dowl. P. C. 111, *Geach v. Coppin*, 3 Dowl. P. C. 74, 75, *Ex parte Owen*, 1 Dowl. P. C. 511, *Lander v. Gordon*, 7 M. & W. 218.† [ERLE, J.—I doubt whether stat. 6 H. 8, c. 6, is express upon that point. Lord CAMPBELL, C. J.—Could not we now make the order of the Lord Chief Baron a rule of this Court? In that case, it would be taken as granted by the full Court.] It would be in the shape of a rule *Nisi* only. [COLERIDGE, J.—The *775] officers of the Court inform us that **it is now the common practice for a single Judge of this Court to grant an order for a procedendo, in vacation.* ERLE, J.—I have often done so.]

Lastly, the writ ought, at all events, to have been granted on a summons to the other side to show cause; or after service of a rule *Nisi*, if the prosecutor had applied to the full Court. [Lord CAMPBELL, C. J.—That objection should have been made earlier. ERLE, J.—I recollect, in one instance, ordering a *procedendo* to issue immediately upon the application. Lord CAMPBELL, C. J.—It is in our discretion to grant it at once, if justice make it expedient.] The application here is not too late; the other side has been taken by surprise.(a)

Lord CAMPBELL, C. J.—I am of opinion that no ground for this application has been established. The ground principally suggested is, that a single Judge at Chambers has no power to make an order for a writ of *procedendo*. But I have no doubt that a single Judge of this Court has power to make such an order, in either term time or vacation; and it is admitted that, under stat. 1 & 2 Vict. c. 45, s. 1, a Judge of either of the other two superior common law Courts has, in general, the

(a) There were affidavits as to this.

same powers as a Judge of this Court. Stat. 6 H. 8, c. 6, does not require the application to be made to the full Court, or in term time; and, where there is no such requirement, a single Judge may always act for the whole Court, subject to his orders being confirmed or set aside by the Court in banc. There can be no doubt that we have authority to make an order of this kind, by a single Judge, a rule of Court. The *jurisdiction, then, being unquestionable, [*776 there is no ground for contending that it has been improperly exercised in this instance. If the conviction ensuing upon the procedendo was not satisfactory, the Secretary of State is the person to whom application should be made.

COLERIDGE, J.—The question here really is, whether what was done by the Lord Chief Baron was done in accordance with the practice of this Court. We have it on the best authority that it is the practice of a single Judge of this Court at Chambers to order a procedendo. That being so, the Lord Chief Baron, by virtue of stat. 1 & 2 Vict. c. 45, s. 1, had power to make such an order. It is said that there ought to have been a previous summons to show cause: but that is a matter entirely for the discretion of the Judge; and we cannot interfere merely on the ground of inconvenience, supposing it to have been caused. If the prisoners have really suffered injustice on account of the trial coming on before they were prepared with their defence, application should be made to the Crown.

ERLE, J.—The question of jurisdiction here is quite distinct from the question of discretion. We cannot enter into the inquiry whether the discretion was rightly or wrongly exercised; we are bound to presume that it has been exercised rightly. As far as the question of jurisdiction goes, I see no difference between proceedings upon an indictment for felony and any other proceedings; and I am clearly of opinion that it has been the practice for a single Judge at Chambers to order a procedendo. I do not see any express *provision, in stat 6 H. 8, c. 6, [*777 rendering it necessary that the application for such writ should be made to the full Court; the statute seems to make the matter one of ordinary jurisdiction. I think, therefore, that the order here was rightly made.

CROMPTON, J., concurred.

Rule refused.

BOSTOCK v. The NORTH STAFFORDSHIRE Railway Company.
June 11.

Where the judge trying a cause discharges the jury because they cannot agree upon their verdict, and a second trial is had, the party who then succeeds is not entitled to costs of the first trial.

And it makes no difference that counsel on both sides, upon conference, assented to the jury being discharged, when the Judge, but for such assent, would have detained them longer.

ON the trial of this cause, at the Chester Summer-assizes, 1851, the jury were discharged without giving a verdict. The cause was tried again at the Spring assizes, 1852, and a verdict found for the plaintiff. The Master, in taxing costs, allowed the plaintiff his costs of the first trial, including costs of a special jury. *Bramwell* on this day obtained a rule nisi for a review of the taxation.

The motion was made on affidavit stating: That, on the first trial, before Wightman, J., the jury retired to consider of their verdict, and, after remaining some time in consultation, returned into Court and informed the learned Judge that they could not agree upon a verdict; some of them adding that there was not the slightest probability of an agreement: That the Judge thereupon suggested that it would be useless to detain the jury any longer; and that they were accordingly discharged. And "that such discharge of the jury was agreed to on *778] *the part of the defendants solely in consequence of the statement made by some of the jurors that they were not likely to agree upon a verdict, and of the suggestion of the learned Judge that they had better be discharged."

An affidavit in answer, sworn by an agent for the plaintiff's attorney in the cause, stated: That the jury were discharged without giving a verdict, with the full consent of both parties, their respective counsel and attorneys being present and expressly consenting thereto: That, after the jury had been locked up for about one hour and forty minutes, they came into Court, and one of them stated that they could not agree, and that there were two dissentients; when, after some conversation on the subject, the leading counsel for the defendants expressed his anxiety that the jury should be discharged, and intimated an opinion that if such were the case some arrangement might possibly be made; upon which Mr. Justice Wightman remarked that he did not at present propose to discharge the jury: That the counsel and attorneys on both sides then conferred, and on both sides a willingness was expressed to discharge the jury, but the plaintiff's counsel refused to consent, unless the defendants would agree that a certain undertaking entered into by them before the Vice-Chancellor should be continued till the following term, which the learned Judge thought reasonable: That some further discussion then ensued, in consequence of counsel for the defendants wishing to continue the said undertaking in a limited and modified form

only, but it was at last agreed that such undertaking should be continued in the same form as it was given before the Vice-Chancellor, and that thereupon the jury should be discharged; upon which the learned *Judge accordingly discharged the jury, expressly telling them [*779 at the same time that the counsel on both sides had consented to their being discharged without giving any verdict: That on the application of plaintiff's counsel, by consent of defendant's counsel, the learned Judge then agreed to certify that this action was a proper one to be tried by a special jury; which certificate was accordingly endorsed on the *Nisi Prius* record. The deponent further stated "that, as he verily believes and infers from the remarks of the said learned Judge, he the said Judge would not have discharged the said jury without giving a verdict until they had been locked up for a much longer period, unless the parties to the action had consented to their being so discharged." The deponent also denied having heard any suggestion from the Judge that it would be useless to detain the jury, or to that effect, until both parties had expressed a desire that they should be discharged; he expressed his belief that, until then, no such suggestion was made by the Judge; and he added that, on the contrary, the learned Judge, after a short conversation, spoke about sending the jury back to consider their verdict further; when the counsel for the defendants, as before stated, expressed his anxiety that the jury should be discharged, and the Judge answered that he did not at present propose to discharge them.

Welsby, on June 12th, showed cause.—The plaintiff ought to have his costs of the first trial. It has been decided, in *Seely v. Powers*, 3 Dowl. P. C. 372, and *Brown v. Clarke*, 12 M. & W. 25,† that, where the Judge, of his own authority, discharges the jury, neither party is entitled to costs. *But in such a case the cause goes off without the default or intervention of either party: where that is otherwise, as in case of a consent, he who ultimately succeeds should have the costs. Here the Judge had refused to discharge the jury, who had not been absent two hours: the counsel conferred, and agreed to a discharge of the jury, upon terms. [COLERIDGE, J.—Leaving the costs to be awarded according to the legal result. Lord CAMPBELL, C. J.—If the Judge discharges the jury by consent, he still does it of his own authority. Their inability to agree is the common misfortune of both parties.] The learned Judge certified for a special jury by consent. *Harrison v. Bennett*, 1 Dowl. P. C. 627, is, in principle, an authority for the plaintiff. [*780

Honyman, contra, was stopped by the Court.

Lord CAMPBELL, C. J.—The rule for a review of the taxation must be absolute. It has been decided that, where the Judge of his own authority discharges the jury, the party succeeding on a subsequent trial is not entitled to costs of that in which no verdict was given: and I think it would be inconvenient and improper to draw a distinction by

saying that, if counsel do not stand out and insist upon the jury being locked up, the case shall be altered as to costs.

COLERIDGE, J.—This was a discharge by the Judge. The consent of counsel amounts only to this, that they do not object, and will not raise any point, on which, possibly, the proceeding might be questioned afterwards. *Though they waive this, the discharge is still the act of the Judge.

ERLE, J.—It would be very pernicious to hold that, where the jury clearly will not agree, an acquiescence by counsel in their being discharged should affect the costs. If the matter were *res integra*, I do not see why, on principle, the party ultimately succeeding should not have costs where the Judge discharges the jury. But the Courts have held otherwise.

CROMPTON, J., concurred.

Rule absolute.

The QUEEN v. LEGGATT. June 11.

Where a wife is, by her own desire, living apart from her husband, and is under no restraint, the Court will not grant a habeas corpus on the application of the husband, for the purpose of restoring her to his custody.

MACAULAY, in last Easter Term, obtained a rule calling on Horatio Bethune Leggatt to show cause why a writ of habeas corpus should not issue, commanding him to have the body of Anne Maria Sandilands, wife of Alfred John Sandilands, before this Court. It appeared by the affidavits in support of the rule that Mrs. Sandilands, who was not on good terms with her husband, was staying, by her own choice, with her son, Mr. Leggatt; and that no coercion had been exercised towards her by him. The application for the writ was made by the husband.

Sir F. Thesiger (with whom was Needham) now showed cause.—There is no case in which an application *of this kind has been granted when the wife was absent from her husband by her own desire. [Lord CAMPBELL, C. J.—When the rule was applied for, the application seemed to me to amount to an indirect mode of suing for restitution of conjugal rights. COLERIDGE, J.—We were all very unwilling to grant the rule; but we were pressed with *In re Cochrane*, 8 Dowl. P. C. 630.] There the application was for a habeas corpus against the husband, who had regained the custody of his wife; and the Court held that he was entitled to exercise a certain degree of constraint towards her till she should be willing to return to her conjugal duties. Here the question is whether the husband has a right to claim his wife by this form of proceeding, when she is living apart from him at her own desire, and is under no kind of restraint. In *Rex v. Wisemam*, 2 Smith's Rep. 617, it was held that a habeas corpus could not issue on the application of the husband, unless it were shown that the wife was detained from him

against her will, and that, if she was seduced away from him, the remedy was by action. [Lord CAMPBELL, C. J.—Here, if the wife were brought before us by habeas corpus, we could not compel her to go to her husband. She would have a right to go where she liked; and her own affidavit shows that she chooses to live with her son.] A habeas corpus could no more issue in such a case as this than in the case of an elopement by the wife. [He was then stopped by the Court.]

Sir *F. Kelly* and *Raymond*, *contra*.—It is admitted that there is no coercion. But to the statement that the wife is living with her son by her own will the answer is *that she cannot be considered to have a will apart from that of her husband, any more than a child of tender years can have a will apart from that of its parent. That point did not arise in *In re Cochrane*, 8 Dowl. 630. In *Rex v. Mead*, 1 Burr. 542, the Court, no doubt, held that the wife, on being brought up by habeas corpus, had a right to go where she chose, and could not be compelled to return to her husband, at whose instance the writ was issued. But that decision proceeded on the ground that the husband had made a complete renunciation of his marital rights. The affidavit of the wife here, which states that she has no wish to return to her husband, may possibly have been made under coercion. [Lord CAMPBELL, C. J.—I do not see how this Court can grant a habeas corpus, where the very affidavits upon which the application is founded show that the wife is under no restraint.] If the husband has a right, as was decided in *In re Cochrane*, to exercise a certain amount of coercion over his wife while she is residing with him, in order to make her return to her conjugal duties, it is clear that he is entitled to exercise some amount of coercion to make her return to his roof.

Lord CAMPBELL, C. J.—The Court granted this rule with great reluctance, and only because we were strongly pressed, at the time, with a case which appeared to be an authority for our so doing. We have always felt great tenderness in dealing with writs of habeas corpus; but, upon consideration, I think we ought not to have granted this rule. The object of a habeas corpus is to restore to liberty a person who has been unjustly *deprived of it. Before the statute of habeas corpus, any person so deprived might summon the party detaining him before the Court, to show for what cause he was detained. But here the wife is under no restraint whatever, and is, by her own desire, living with her son, from whom it is proposed to take her. Whether the husband has a right to the custody of her or not, is a question *alieni fori*: we have no jurisdiction over it. If a writ of habeas corpus were to issue, and the wife were to be brought before us, we could not compel her to return to her husband; she would be at liberty to go where she chose. If she has no good cause for remaining away from her husband, he may obtain a decree of the Ecclesiastical Court ordering her to return to him. This case is quite different from that of an infant.

There the parent has a right to the custody of the child; and, if it be of tender years, the Court will make an order for its restoration to him. But a husband has no such right at common law to the custody of his wife. We ought not to have granted this rule; and we have no power to make it absolute.

COLERIDGE, J.—The only doubt which I felt at the time of the application for a rule nisi was whether the wife ought not to be brought before us, to say whether or not she was under any restraint. But it is now admitted, by the affidavits in support of the application, that she is not under restraint. We should therefore be doing what is totally useless by granting the writ.

ERLE, J., and CROMPTON, J., concurred.

Rule discharged with costs

*785]

*BARNES v. MARSHALL. *June 11.*

Plaintiff, a carrier and wharfinger at Swindon, agreed in writing with defendant, living in Surrey, to carry his timber by barge to London, at 16s. per ton, including all charges but wharfe. It was necessary to haul the timber from the place where it lay to the wharf; and plaintiff provided horses for the purpose when defendant's horses were absent. Plaintiff sued in the Swindon county court for the balance of his account for the carriage, including a separate charge for hauling.

Held, on motion for a prohibition, that the hauling and the carriage formed one cause of action; that such cause of action was not complete until the timber was delivered in London; and that therefore the judge of the county court had not jurisdiction under stat. 9 & 10 Vict. c. 93, s. 60.

BOVILL, in last Easter Term, obtained a rule calling on the plaintiff to show cause why a prohibition should not issue to the judge of the county court held at Swindon, in Wiltshire, to stay further proceedings in the action in that Court between the plaintiff and the defendant.

It appeared from the affidavits that the plaintiff was a carrier and wharfinger at Swindon, and that the defendant lived in Surrey. The action was brought for the loading at Swindon, and the carriage from Swindon, by canal, to Woolwich and London, of certain timber of the defendant, under the following written agreement:

“Swindon, May 12th, 1850.

Memorandum. I hereby agree to barge Mr. George Marshall's oak timber from Swindon Wharf to London, to any wharf in the river, at 16s. per ton of 40 feet, string measure, to include all charges except wharfe, or to Bristol at 9s. per ton of 40 feet string.

JOSEPH BARNES.”

In order to crane the timber into the barge, it was necessary to haul it to the wharf from a field on the other side of the canal. When the defendant's horses were not on the spot, the plaintiff provided horses
*786] for hauling the timber; and two items in his demand, *amounting to 11. 16s., were for hauling by horses which he had provided.

The claim of the plaintiff was for 50*l.*, after giving credit for payments and deductions to the amount of 125*l.*

Hodges now showed cause.—The defendant contends that the cause of action did not arise within the jurisdiction of the county court. Stat. 9 & 10 Vict. c. 95, s. 60, provides that a “summons may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought; or, by leave of the court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned courts.” Here the cause of action was the carriage of the timber; and such cause of action arose at Swindon, within the jurisdiction of the county court. The plaintiff, being a carrier by canal and a wharfinger, is a common carrier; *Maving v. Todd*, 1 Stark. N. P. C. 72 (E. C. L. R. vol. 2); and a common carrier is entitled to be paid for the carriage of goods as soon as they are delivered to him; *Pickford v. Grand Junction Railway Company*, 8 M. & W. 372,† *Wyld v. Pickford*, 8 M. & W. 443, 458.† [CROMPTON, J.—The court did not hold, in either of these cases, that the carrier could sue for the carriage of the goods before he had carried them. Lord CAMPBELL, C. J.—The question here is, when did the cause of action arise?] It arose immediately upon the plaintiff’s receiving the timber on board his barge. In *Pickford v. Grand Junction Railway Company*, 8 M. & W. 378,† [*787 Parke, B., said that the carrier was “bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded, on the carrier taking charge of the goods.” [Lord CAMPBELL, C. J.—The bailor becomes bound to pay, but bound to pay on delivery only.] The cause of action arises when the contract is made; *Harwood v. Lester*, 3 B. & P. 617. At all events the plaintiff here was entitled to be paid on the spot for the hauling of the timber. That was not a part of his contract as a carrier. [Lord CAMPBELL, C. J.—Could he recover for the hauling, if he had not completed his contract to carry?] He could; and this is clearly a “material point” in which cause of action arises within the jurisdiction of the county court, according to sect. 128 of stat. 9 & 10 Vict. c. 95.

Bovill, contrà.—Sect. 128 gives the superior courts concurrent jurisdiction “where the cause of action did not arise wholly or in some material point within the jurisdiction” of the county court. But sect. 60, which is the clause expressly declaring in what cases a summons may issue from the county court, provides that it may issue as there stated, when “the cause of action” arose within the jurisdiction. That means the whole cause of action. In *Buckley v. Hann*, 5 Exch. 43,† it was held that “the cause of action,” in sect. 40 of the London Small Debts Act (10 & 11 Vict. c. lxxi., local and personal,

public), meant the whole cause of action. The same construction was given to sect. 60 of stat. 9 & 10 Vict. c. 95, in *Wilde v. Sheridan*, 21 L. J., N. S., Q. B. (Bail Court), 260. In the case *In re* *788] *Aykroyd*, 1 Exch. 479,† it was held that sect. 63 of the *last-mentioned Act, which provides that it shall not be lawful for any plaintiff to divide "any cause of action" for the purpose of bringing two or more suits in the county courts, applied not merely to an action arising upon a single contract, but to an action founded on several contracts where one claim was made in respect of all. The plaintiff, therefore, is not entitled to sue in the county court in respect of his charge for hauling; his claim is for the hauling and the conveyance of the timber combined; and he is not at liberty to separate the two items. In fact he could not have made any claim for the hauling alone; he is entitled to be paid for it only as being comprised in the general contract for carriage. If the payments for which credit is given in the particulars were applied in discharge of the earlier items, the charge for hauling would be paid.

ERLE, J.(a)—This rule must be made absolute. The first question is whether the cause of action, for carrying the timber from Swindon to London, arose at Swindon. I think that, as the plaintiff's part of the contract was to carry the timber to London, he was not entitled to demand payment until the consideration on his part had been executed by delivery of the timber there. It is contended that, even if the greater part of the 50*l.* claimed was for a cause of action not within the jurisdiction of the county court, the plaintiff could sue there for the 1*l.* 16*s.* claimed by him for hauling the timber. This is not so; the plaintiff could have claimed nothing for the hauling unless he had completed that of which the hauling was the first step, namely, the carriage of the timber to London. *To support an action for the *789] hauling only, the agreement must have contained a specific contract to pay for such hauling, apart from the charge for carriage.

CROMPTON, J.—As regards the carriage of the timber, it is clear that the plaintiff had no cause of action till the timber was delivered at London. It is true that a carrier is not bound to receive goods for carriage until he is paid for such carriage; but he cannot sue for the carriage until it is completed. As to the charge for hauling, the plaintiff could not sue for it in the county court unless there were a separate contract to pay for it, apart from the contract for carriage. Here there is no such contract; and therefore the hauling must be considered, as, indeed the whole course of dealings shows that it was considered by the parties, to be comprised in the contract for carriage, and not to form a distinct "cause of action" within sect. 60. Rule absolute.(b)

(a) Lord Campbell, C. J., left the Court in the course of the argument. Coleridge, J., was absent.

(b) See *Re Walsh*, 1 E. & B. 383 (E. C. L. R. vol. 72), and *Re Fuller*, 3 E. & B. 573 (E. C. L. R. vol. 75).

POCOCK v. PICKERING and Others. *June 12.*

The attestation of a warrant of attorney was as follows:

"Signed, sealed, and delivered," &c., "in the presence of me, H. C." (an attorney), "who, at the request and in the presence of the said J. H. B., J. C., and J. H. P." (the executing parties), "have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them and each of them the nature and contents hereof. H. C."

Held, not a sufficient compliance with stat. 1 & 2 Vict. c. 110, s. 9.

On motion to set aside a Judge's order made at Chambers upon reading certain affidavits, the party moving omitted to bring before this Court the affidavits produced at Chambers; and the rule was therefore discharged with costs. Held, that he might (after payment of costs) renew the same motion, putting in the affidavits.

JOSEPH HEATHCOTE BROOKS, James Coghlan, and James Henry Pickering, to secure payment of an annuity *gave a warrant of attorney, dated 26th September, 1844, to confess judgment against [*790 them in the Queen's Bench in an action of debt at the suit of George Pocock, the grantee. The attestation was as follows.

"Signed, sealed, and delivered, being first duly stamped, in the presence of me Henry Clarke, who, at the request and in the presence of the said Joseph Heathcote Brooks, James Coghlan, and James Henry Pickering, have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them and each of them the nature and contents hereof.

"H. C. CLARKE,

"13, George Street, Mansion House."

Judgment was signed in January, 1852, and a fi. fa. issued, under which the sheriff levied. Pollock, C. B., upon summons, made an order (April 5th) setting aside the warrant of attorney and judgment and all subsequent proceedings, with costs, on the ground that the attestation was not according to stat. 1 & 2 Vict. c. 110, s. 9.(a) The order was drawn up on reading *the affidavits of James Russell and of [*791 James Henry Pickering and another. The Lord Chief Baron, when making the order, recommended that the opinion of this Court should be taken as to its propriety.

In the ensuing Easter Term, a rule Nisi was obtained, to set aside

(a) Stat. 1 & 2 Vict. c. 110, s. 9. "And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment or a cognovit actionem due information of the nature and effect thereof; be it enacted, that from and after the time appointed for the commencement of this Act no warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall be of any force unless there shall be present some attorney of one of the superior Courts on behalf of such person expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

Sect. 10. "And be it enacted, that a warrant of attorney to confess judgment or cognovit actionem not executed in manner aforesaid shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same."

the Lord Chief Baron's order. The motion was made on an affidavit of the clerk to the plaintiff's solicitors; but the affidavits of Russell and Pickering, used at Chambers, were not brought before the Court.

In the same term (May 6th) *Bramwell* showed cause, and contended that, without the affidavits on which the Judge's order was made, the motion could not be entertained; citing *Needham v. Bristowe*, 4 Man. & G. 262. *The Court* (Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.) discharged the rule with costs on this objection.

B. C. Robinson, on the following day, moved again to rescind the Lord Chief Baron's order, on an affidavit by the clerk to the plaintiff's solicitors, verifying copies (which were annexed) of the affidavits at Chambers, but stating that the affidavits were not used there, the Lord Chief Baron deeming it unnecessary to have them read, as the question before him turned wholly upon the form of the attestation. One of the affidavits contained some statements as to the part taken by Pickering in the transaction relative to the warrant of attorney; but neither of them stated anything as to the attestation. *Robinson* cited *Regina v. East Lancashire Railway Company*, 9 Q. B. 980 (E. C. L. R. vol. 58). The Court granted a rule *Nisi*, provided that the costs of the previous application were paid.

*792] **Bramwell* and *R. Hall* now showed cause.—This second motion is contrary to the general rule that a party shall not renew an application to the Court which has once failed by being brought forward on imperfect materials; *Regina v. The Great Western Railway Company*, 5 Q. B. 597 (E. C. L. R. vol. 48), and *Stultz v. Wyatt*, 6 Q. B. 666 (E. C. L. R. vol. 51),^(a) are instances of the practice. *Regina v. The Manchester and Leeds Railway Company*, 8 A. & E. 413 (E. C. L. R. vol. 35), is a leading authority on this subject; and the case was much harder than the present; the applicant there lost his remedy against the Company for the taking of his land: here, if the warrant of attorney be set aside, the annuity deed is still available. [Lord CAMPBELL, C. J.—Sometimes the discharging of a rule is in the nature of a nonsuit, and does not prevent coming to the Court again. COLERIDGE, J.—When the rule is discharged on such a ground as the mere misentitling an affidavit, the application clearly may be renewed.]

Then as to the attestation. Stat. 1 & 2 Vict. c. 110, s. 9, requires two things: that the attorney shall, by his attestation, declare himself to be attorney for the person executing, and shall also thereby state that he subscribes as such attorney. One only of these requisitions is fulfilled here. The Courts have always insisted upon a strict application of the statute. *Potter v. Nicholson*, 8 M. & W. 294,† and *Everard v. Poppleton*, 5 Q. B. 181 (E. C. L. R. vol. 48), are instances where the attorney had omitted to state that he subscribed as such attorney,

(a) See as to the rule, generally, the judgment of Parke, B., in *Dodgson v. Scott*, 2 Exch. 457.† Also, *Re Butler and Masters*, 13 Q. B. 841 (E. C. L. R. vol. 66).

and the attestation was held insufficient. In *Poole v. Hobbs*, 8 Dowl. P. C. 113. "Witness G. E., *defendant's attorney, named by him, and attending at his request," was held not to satisfy the [*798 second requisition. The authorities upon the subject were reviewed in *Lewis v. Lord Kensington*, 2 Com. B. 463 (E. C. L. R. vol. 52), and the general rule of strictness not questioned, though an attestation was there held sufficient which did not in terms comply with the statute: there was, however, substantially a clear fulfilment of the directions. So in *Holt v. Kershaw*, 5 Dowl. & L. 419, an attestation was held sufficient in which the party did not literally declare himself to be, or to subscribe as, attorney for the person executing; but the material allegations were in substance distinctly made. [ERLE, J.—I should have thought that, if the whole skill of Westminster Hall had been united to frame a perfect attestation, it would have been like that in *Lewis v. Lord Kensington*. Yet it passed with great difficulty.] The attestation here is much farther from the terms of the statute. In *Hibbert v. Barton*, 10 M. & W. 678,† the cognovit purported to be "witnessed by me, W. P., as the attorney of the said W. Barton, attending at the execution hereof at his request, and expressly named by him;" and this was held not sufficient. [ERLE, J.—I was counsel in that case, and never could understand the reason of the decision to this hour.] Consistently with the attestation, the attorney might not have acted for the party executing until the very moment of execution. He might not have read over or explained the document, or had the opportunity of doing so, as attorney for that party. [ERLE, J.—Parke, B., says there: "I agree that no precise form of words is rendered necessary for this purpose by the Act; but still those which are used must be *such as will enable the Courts to collect both the facts which I have stated, namely, that the attesting attorney was present for [*794 the purpose of advising the defendant as to the nature and effect of the instrument, and that he attested it as such attorney." He admits, therefore, that, if those two things could have been collected from the document, the attestation would have been valid.] The two facts must be collected by construction of the document itself; not by inference. [Lord CAMPBELL, C. J.—Or only by necessary inference.] Here, anything that was done by the attesting solicitor until the very act of attestation might have been done before he became attorney for Pickering, and even in the capacity of attorney for Pocock. Whether this was so or not, the rule is that an attestation of this kind shall be beyond the reach of quibble. [COLERIDGE, J.—And that things which might appear on the instrument should not be left as matter of proof.]' In *Gay v. Hall*, 5 Dowl. & L. 422, an attestation not stating that the attorney was expressly named by the defendant, and attended to inform him as to the nature of the instrument, was held good, but on the ground that the words of sect. 9, beginning "which attorney shall subscribe,"

&c., were expressly followed. The objection now taken is not barred by lapse of years; an application of this kind may be made at any time; 2 Chitt. Archb. 858, 8th ed.(a) (The plaintiff's counsel did not dispute this.)

B. C. Robinson and *Lush*, contra, were desired to argue the second point only.—[Lord CAMPBELL, C. J.—The question on that is, whether *795] it be a necessary *inference from the words used that the requisitions of the statute have been complied with.] As to declaring that the party who attests is attorney for the party executing, that is done by the subscription; the words of sect. 9 being “shall subscribe his name as a witness,” “and *thereby* declare himself to be attorney,” &c. [COLERIDGE, J.—Can that be by the mere subscription? Lord CAMPBELL, C. J.—It is impossible.] Parke, B., in *Elkington v. Holland*, 9 M. & W. 659,† was inclined to think that the declaring might be by simply subscribing. [ERLE, J.—That was before *Hibbert v. Barton*, 10 M. & W. 678.†] *Lewis v. Lord Kensington*, 2 Com. B. 463 (E. C. L. R. vol. 52), and other cases show that, to fulfil the requisitions of sect. 9, a specific form of words is not necessary: it is enough if all the expressions used lead to the conclusion that the subscribing party attends as attorney for the party executing, and subscribes as such. The words here are equivalent to those in *Gay v. Hall*, 5 Dowl. & L. 422. The attestation plainly intimates that, when the warrant of attorney was executed, Clarke was present throughout. [Lord CAMPBELL, C. J.—He ought to have been so present in the character of attorney for Pickering.] It is not consistent with the words that an attorney for Pickering should have been present at first, but should have walked out, and then another attorney, Clarke, should have come in and attested. Clarke states that he read over and explained the document. [Lord CAMPBELL, C. J.—That may have been otherwise than as attorney for Pickering.] The same might be said if he had actually declared that he subscribed as Pickering's attorney. He states here that, at the request, &c., of Brooks, Coghlan, and Pickering, *796] *he subscribes, &c., as “the” attorney on their behalf, which excludes the supposition of another being employed.

Cur. adv. vult.

In the ensuing vacation (June 18th), the three learned Judges who heard the argument, being divided in opinion, delivered judgment seriatim.

Lord CAMPBELL, C. J.—I am of opinion that this attestation is insufficient. The rule established by *Hibbert v. Barton*, 10 M. & W. 678,† and other cases cited seems to be that, if the form given by stat. 1 & 2 Vict. c. 110, is not exactly followed, the words used must *by necessary implication* show that all the three requisites of the statutable attestation have been complied with. Here the attorney sufficiently

subscribes his name as a witness to the due execution of the warrant of attorney, and states that he subscribes as such attorney; but does he "thereby declare himself to be attorney for the person executing the same?" that is to say, that he acted as the attorney of the party in this transaction, doing what is required of such attorney to give validity to the instrument. According to probable intendment from the words "having first read over and explained to them and each of them the nature and contents hereof," it may be inferred that he did so *as their attorney and at their request*: but this is not a *necessary* inference; for he may have read over the document and explained it, as the attestation states, without any request from them and before he was employed by them as their attorney. *It is painful to consider such subtleties; but we are bound to give effect to them if we would follow former decisions upon this enactment of the Legislature for the protection of debtors. [*797

COLERIDGE, J.—The question in this case is, whether the provisions of stat. 1 & 2 Vict. c. 110, s. 9, are satisfied by an attestation to the execution of a warrant of attorney by three persons named therein, which is in the following words. (His Lordship here read the attestation, for which see p. 790, *antè*.)

The section enacts that "no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

In construing an Act of parliament, our first business, I conceive, is to examine the words themselves which are used; and, if in these there be no ambiguity, it is seldom desirable to go further; and, although from the common uncertainty of language we may very frequently be driven to ascertain the intention by a consideration of the preamble where it recites the object, or of the previous common law where the statute clearly alters or supersedes it, in order to settle the meaning of the enactment itself, yet the object still is only to ascertain *the mind of the Legislature as expressed in words: and, when [*798 in either of these ways you have arrived at the meaning, I think nothing is more dangerous than to flinch from that conclusion because we think the enactment is less wise or efficacious than it might have been made, or even wholly fails of its object. Perhaps the most efficacious mode of procuring good laws, certainly the only one allowable to a court of justice, is to act fully up to the spirit and language of bad

ones, and to let their inconvenience be fully felt, by giving them their full effect.

The clause in question has obviously two parts. Certain things it requires to be done before execution: an attorney must be present on behalf of the person about to execute; he must have been expressly named by that person; he must attend at his request; and he must inform him of the nature and effect of the instrument he is about to execute. All this precedes execution, and, *à fortiori*, attestation: and whether all this has been complied with is left in case of dispute to be proved extrinsically by evidence: no particular of it need appear to have been done on the face of the instrument. Then comes the execution, and the provision as to the form of attestation. The same attorney spoken of before is now to become the witness; and in discharging this distinct duty he is to do three things: first, he is to subscribe his name as witness; secondly, he is in the attestation to declare himself the attorney for the person executing; thirdly, he is also in the attestation to state that he subscribes as such attorney.

The two parts seem to me entirely distinct, and framed with different objects: both must be complied with, or the instrument will be of no force. If the attorney has *failed in any one of the requisites *799] in fact which the former part requires, it will be in vain to rely on an attestation faultless on the face of it: if the attestation be deficient, or informal in any particulars on its face, that cannot be cured by its stating, or its being proved, that in fact he fulfilled all the requirements of the former part.

. In the attestation in question, H. C. Clarke has subscribed his name as a witness: he has stated that he has so done as the attorney of the parties executing: but he has not beyond this and in express terms declared himself to be their attorney.

There is not, then, a literal compliance with the statute. Is there, then, a virtual one? It appears to me not: and I wish to observe that this is not the same question as whether the attestation shows that the parties had substantially all the protection and information which they could reasonably desire, or the statute intended. The protection and information which they could reasonably require, and which the statute intends, must be given before execution, and before attestation; and we are now upon a question as to the sufficiency of the attestation; it is not enough that Mr. Clarke should have been *de facto* such an attorney, so named, so requested, and so discharging his duty, as the section requires, before execution: he must, beyond this, declare in his attestation on the face of it that he is the attorney of the parties.

Now there can be only two ways in which this attestation can be said to show a virtual compliance with this requirement: the first, that to state that he subscribed his name as the attorney is the same as to declare himself to be the attorney. But, if that be so, I remark

*first that you may then strike the words out of the statute: [800
 you give them no distinct meaning at all. And, secondly, that
 in common sense the two parts of the sentence have not the same mean-
 ing, are not tautologous: a man may very well subscribe his name as
 attorney, and state truly that he does so, without being the attorney in
 the transaction: if he come in at the last moment before the execution,
 he might do the former and yet not be in a condition to make the
 declaration as to the latter.

The second mode in which it may be argued that this attestation shows
 a virtual compliance with the statute is in its asserting that H. C. Clarke
 has subscribed his name at the request of the parties and in their pre-
 sence, and that he had first read over and explained to them and each
 of them the nature and contents of the instrument; in other words, the
 argument is that to declare he has performed the duties of an attorney
 to the parties in the transaction is the same as to declare that he is
 their attorney. Now here again it is obvious to remark, first, that this
 particular enumeration does not include all the particulars expressly
 required by the statute; it does not include the being "expressly named
 by" the parties; secondly, that, if the statute only intended the attesta-
 tion to show on its face a compliance with the particulars required before
 execution, its language is most inappropriate for any such purpose; and,
 thirdly, that to perform the duties of attorney to a person in this matter,
 and to be his attorney in it, may be in fact, according to this statute as
 expounded in many decisions, very different things. If the plaintiff's
 attorney, "at" the "request" of the parties, had "read over and
 explained to them and each of them the *nature" of the instru- [801
 ment and its contents before execution and attestation, and had
 "set and subscribed" his "name as the attorney on their behalf attest-
 ing the execution" thereof, he yet would not have been their attorney,
 nor could he truly have declared himself to have been so. In other
 words, the present attestation may be true in every particular, and yet
 the requisites of the statute not complied with.

But, lastly, it is obvious on reading the statute that the precisely
 worded provisions as to the attestation are intended as an additional
 security, certainly to the debtor, probably to both parties, beyond what
 is afforded by those which guard the execution. Whether such additional
 security is thereby gained, or whether it was on the whole wise to seek
 for it, is immaterial to us, whose only business it is to see that the pro-
 visions, such as they are, are complied with.

I conclude, then, that this attestation neither literally nor in sub-
 stance satisfies the requisites of the statute; and I feel neither regret
 nor satisfaction in arriving at any such conclusion in this, or in any
 similar case. In deciding them we ought not to have our minds dis-
 tracted by looking to the right or left at the particular circumstances,
 which we very often know but imperfectly after all, and which, if we

knew them ever so well, could form no safe rule for the interpretation of the statute, which ought to be general. If there are careless lenders and fraudulent borrowers on the one hand, there may be usurious or over-reaching lenders and oppressed or over-reached borrowers on the other: but in either case the rule must be the same, which the statute lays down, if a Court of law is to apply it with certainty: and, unless *802] applied with certainty, it becomes no rule at all. The *strictness of former decisions has been complained of as technical and favouring fraud; I am far from saying that none of them have had the effect of defeating an honest security: is any rule so wisely framed as to be secure from abuse? But I believe that this strictness has led to greater care in the execution of these instruments, which is attested by their coming before the courts much less frequently than formerly. It is perfectly easy to comply literally with what the statute requires: that course must be safe. I cannot feel the force of the argument that it is difficult to frame a faultless equivalent: no one need have recourse to equivalents; and those who will speculate on such have no right to complain if they should turn out to be insufficient.

I have not thought it necessary to refer to any decisions specifically: it was not contended that the general current of authority was not in accordance with the view I have taken; but it was rather desired to review them. In my opinion, if the matter were now for the first time to be considered, it would be right to come to the same conclusion.

I think the rule should be discharged.

ERLE, J.—In this case the question has been whether a memorandum of attestation to a warrant of attorney, signed in the presence of A. B., who subscribe my name as the attorney attending on behalf of defendant and at his request attesting the execution, having first read over and explained the instrument, is a sufficient compliance with stat. 1 & 2 Vict. c. 110, s. 9. The memorandum is properly subscribed by the name of the witness, and properly states that he subscribes as *803] *attorney; and, according to my understanding of the words, it declares that he who now as the attorney of the party attests the execution had, before such execution, as the attorney of the party, read over and explained to him the nature of the instrument. Assuming that the statute is to be construed strictly and a literal compliance exacted, according to the judgment in *Hibbert v. Barton*, 10 M. & W. 678,† this is sufficient.

According to that case the memorandum must allege that the attorney subscribing had acted as attorney to inform the party of the nature of the instrument; it assumes that an attorney may subscribe as attorney in the subscription without having been the attorney to inform of the nature of the instrument: it was an extreme construction, adopted with doubt by Baron Parke, and with such repugnance on the part of Lord Abinger that he assigned as his reason the then existing feeling in favour

of defendants and prisoners: and no one perceived more clearly than himself the mischief which must result from this feeling if it were carried to the extent of generally construing instruments so as to defeat the intention of the parties.

There is no dispute that this attestation, in respect of the witness subscribing his name and stating that he subscribes as the attorney, is correct. But the question has been whether the witness declared by the attestation, according to Lord Abinger, that he had been attorney in the actual transaction, and knew what the document was about; according to Baron Parke, "that the attesting attorney was present for the purpose of advising the defendant as to the nature and effect of the instrument, *and that he attested it as such attorney." Now by [*804 the present attestation it appears to me to be stated that the witness who subscribes as attorney had, as attorney, first read over and explained the instrument. In grammar, "who" may, according to the context, signify "and I;" "as," in law, signifies "in the capacity of;" the expression that an agent did an act in a certain capacity is equivalent to "the agent being in that capacity did the act;" and the expression that an agent being in a certain capacity did an act, having first done another act, is equivalent to "the agent being in that capacity did the first act first and then the second act." This attestation, then, expresses grammatically that "I, being the attorney attending on behalf of the party and at his request, read over and explained the instrument to him, and now attest his execution." That which is expressed is both stated and declared; and he who states or declares need not state or declare that he states or declares. Whether the statute or the decisions be referred to, the attestation expresses all the ideas required by the Legislature as perfectly as language will permit; it being, as far as I know, impossible to frame a sentence incapable of misconstruction.

No definite objection was offered to this attestation in argument: the learned counsel suggested that quibbles in respect of such instruments had been before supported, and perhaps a quibble might be found on the present occasion. If it is said that "the parties have the words of the statute before them, and why cannot they use them?" I would answer that no form is given by the statute, and that this objection ought never to receive assent unless the objector adduces that which he can show to be a valid form, and by comparison with a *valid form points out [*805 the invalidity of the form objected to.

If the words of the enactment are strictly followed, the attestation would be void according to *Hibbert v. Barton*, 10 M. & W. 678.† In the words of the statute, the attestation would be "I subscribe my name as a witness to the execution," &c., "and I hereby declare myself to be attorney for the party executing the same, and state that I subscribe as such attorney:" and it would be consistent with this that the subscribing witness became attorney at the time of subscribing without having

been attorney before; and according to that decision it is necessary to add that he who subscribes and declares himself to be the attorney had first informed the party of the nature of the instrument that is read over, and explained it to him, which is done here: and, as the subscribing must be not merely by the same man but by the same attorney who gave the information, I cannot suggest a more precise expression than that "I subscribe as the attorney attending on behalf of the party, attesting his execution, having first explained the instrument to him."

I regret that I differ from my Brethren, because this case will be added to the number of those where the creditor instead of receiving *from* is adjudged to pay to his debtor, and where the law increases, instead of redressing, the loss from wrong.

Rule discharged without costs.(a)

(a) See *Halford v. Cameron's Coalbrook Steam Coal and Swansea and Loughor Railway Company*, 16 Q. B. 442 (H. C. L. R. vol. 71); and *Edwards v. Cameron's Coalbrook, &c., Railway Company*, 6 Exch. 269.†

*806] *DOE on the demise of HUDSON v. ROE. June 12.

The provision in stat. 3 & 4 W. 4, c. 67, s. 2, that "all writs of execution may be tested on the day which the same are issued, and be made returnable immediately after execution thereof," extends to writs of *habere facias possessionem*, the enacting words being plain, and neither the title of the Act nor the preambles of sects. 1, 2, affording sufficient ground for restricting the clause to actions merely personal.

PETERSDORFF, in this term, obtained a rule calling upon the lessor of the plaintiff to show cause why the judgment, the writ of possession and the execution in this cause should not be set aside, and why possession should not be restored to Daniel West and others named in the rule. The motion had been first made at Chambers before Crompton, J., who referred the matter to the full Court. The only ground of application which it is material to notice here was, that the writ of possession, bearing teste February 21st, 1849, was made returnable "immediately after the execution" thereof. The sheriff took possession under the writ on April 1st, 1852.

Bramwell and *Brewer* now showed cause.—The question, as to irregularity, depends on the construction of stat. 3 & 4 W. 4, c. 67.(a) The

(a) Stat. 3 & 4 W. 4, c. 67, is entitled "An Act to amend an Act of the second year of his present Majesty, for the uniformity of process in personal actions in his Majesty's Courts of law at Westminster."

Sect. 1 is as follows: "Whereas by an Act passed in the second year of his Majesty's reign, intituled *An Act for uniformity of process in personal actions in his Majesty's Courts of law at Westminster*, it is enacted, that the process in certain actions therein mentioned shall be according to the form contained in a schedule to the said Act annexed, and shall be called a writ of summons, and that such writ shall be issued by the officer of the said Courts respectively by whom process serviceable in the county therein mentioned hath been heretofore issued from such Court: And whereas since the commencement of the said Act the writ of summons, and other writs mentioned therein, issued into the county of Middlesex, have been issued, signed, and sealed by the signer of the bills of Middlesex in the King's Bench, whilst such writs into all

provision of *sect. 2 is express, that "all writs of execution" may [807
 be tested on the day when they are issued, and be made return-
 able immediately after execution. No other part of the Act restrains
 the construction. A general enactment may be restricted by a para-
 mount intention apparent in the rest of the statute; but that is not
 *apparent here. Good sense requires that, under this enact- [808
 ment, all writs of execution should be tested and made returnable
 in the same manner. It may be urged that the statute, by its title,
 purports to be passed for amending the Act for uniformity of process
 in "personal actions;" but the answer is that the title does not, and
 need not, disclose the whole scope of the statute, and cannot restrain its
 clear provisions; and that the enacting words are precise. [Lord CAMP-
 BELL, C. J.—The former Act might be amended by introducing a pro-
 vision for other than merely personal actions.] And the second section
 of this statute is not an amendment of the former Act at all. The only
 clause as to executions in stat. 2 W. 4, c. 39, is sect. 15; and that is
 not interfered with by sect. 2 of the present Act. [Lord CAMPBELL,
 C. J.—The enacting part of a statute may go beyond both the title and
 the preamble.] There is nothing in the preamble to sect. 2 repugnant
 to an enactment for process in ejectment. No decision has yet been
 given on this point; and the books of practice treat it as doubtful.
Lewis v. Holmes, 10 Q. B. 896 (E. C. L. R. vol. 59), (where *Kemp v.*
Hyslop, 1 M. & W. 58,† *S. C. Tyr. & G.* 77, was cited), and *Levy v.*
Hamer, 5 Exch. 518,† are no authorities in favour of the rule. In the
 first and last mentioned cases it was held that proceedings in outlawry
 could not be founded on a ca. sa. made returnable immediately after
 execution; but that was because the writ could be executed only by

other counties and cities have been issued and signed by a different officer, and have been sealed
 by the sealer of the writs, under and by virtue of an order of the Judges of the said Court: And
 whereas it is expedient that all writs issued into the county of Middlesex from the Court of
 King's Bench should be signed and sealed by the same persons and in like manner as all other
 writs issued from the said Courts into other counties and cities; Be it therefore enacted," "That
 so much of the said Act" "as provides that the writ of summons therein mentioned shall be issued
 by the officer of the said Courts respectively by whom process serviceable in the county therein
 mentioned hath been heretofore issued from such Court, shall be and the same is hereby repealed;
 and that from and after the passing of this Act all writs of summons, distringas, capias, and
 detainer, issued into the county of Middlesex from the Court of King's Bench, shall be signed,
 sealed, and issued, and the fees thereon shall be taken and accounted for, by the same person or
 persons and in like manner as all other writs of summons, distringas, capias, or detainer issued
 from the said Court of King's Bench under and by virtue of the said recited Act; any law, cus-
 tom, or usage to the contrary notwithstanding."

SECT. 2. "And whereas by the existing law, and the practice of the said Courts of common
 law, actions may be brought and issues proceed to trial and final judgment, in vacation, notwith-
 standing the cause of action may have arisen subsequent to the then preceding term, and jury
 process of writs of execution are now by law tested in term time only; be it therefore enacted,
 that from and after the passing of this Act the writ of venire facias juratores may be tested on
 the day on which the same shall be issued, and be made returnable forthwith, and that the writ
 of distringas juratores or habeas corpora juratorum may be tested in term or vacation on a day
 subsequent to the teste of the writ venire facias juratores, and that all writs of execution may be
 tested on the day which the same are issued, and be made returnable immediately after execu-
 tion thereof: Provided always, that when any trial is to be had at bar, the writ of venire facias
 juratores shall be made returnable as heretofore."

arresting the defendant, and if there was an arrest there was no ground for an outlawry; a reason not applicable here. [Lord CAMPBELL, C. J.—It would seem a strange distinction that, in *ejectment, a fi. fa. should be returnable immediately, if for costs only, but not so if an habere facias possessionem were added.]

Petersdorff, contrà.—The practice as to issuing writs of habere facias possessionem is regulated by stat. 11 G. 4 & 1 W. 4, c. 70, s. 38. Sect. 2 of stat. 3 & 4 W. 4, c. 67, is part of a body of enactments as to process, fulfilling, among other objects, that of empowering the Judges to give speedy execution in personal actions. That it does not apply to ejectments is clear from the introductory recital of that section, that, by the existing law and practice, actions may be brought and tried in vacation though the cause of action may have arisen after the preceding term. That is the reason of the enactment; and it applies to personal actions, but not to ejectment, which could not have been brought in vacation, except after issuable terms under the provisions of stat. 11 G. 4 & 1 W. 4, c. 70, s. 36. [Lord CAMPBELL, C. J.—Still the enacting part of the clause might extend to actions of ejectment. COLERIDGE, J.—There were, when the clause was framed, some actions of ejectment which might be brought in vacation.] The Legislature probably contemplated only those which ordinarily might be so brought. The title of stat. 3 & 4 W. 4, c. 67, which mentions personal actions only, is not immaterial. [Lord CAMPBELL, C. J.—Notice is taken of the title where the enactment is doubtful. I remember that was so in Dr. Free's case.(a)] The recital of sect. 1 must be looked to in construing sect. 2; and in *810] that recital it is evident *that personal actions only are contemplated. If a fi. fa. were issued for costs in ejectment, the return must be according to the old practice.(b) [COLERIDGE, J.—You cannot contend that, in an action of ejectment, a venire facias juratores tested in vacation under this Act would not be returnable immediately.] Questions of this kind cannot be tried by a reference to principle, since the modes and forms of proceeding are entirely the creatures of legislation. It would be a great inconvenience, however, if a writ of execution divesting property from the ostensible owner could be made capable of immediate operation, though the party obtaining it might delay putting it in force for years. [Lord CAMPBELL, C. J.—Is any greater notoriety given by making it returnable at an interval of some days?] There is more time to search after it is filed. [COLERIDGE, J.—What greater hardship does the immediate return create in the case of land than in that of mere personalty?] If goods were sold in market overt, pending the writ, the property in them would pass: land cannot pass so. [ERLE, J.—Could a purchaser of land get more information

(a) *Free v. Burgoyne*, 5 B. & C. 400 (E. C. L. R. vol. 11). S. C., in Dom. Proc., 2 Bugh. N. S. 65.

(b) See, however, *Chitty's Forms of Practical Proceedings*, 376—378, 6th ed.

by looking after the writ of possession than he may by searching for the judgment ?]

LORD CAMPBELL, C. J.—Without prejudice to this rule on the merits, I think there is no irregularity here. Stat. 3 & 4 W. 4, c. 67, s. 2, contains enacting words clearly sufficient to include proceedings in ejectment; “all writs of execution.” The defendant has to show that this is limited to execution in personal actions. I think no weight can be given to the title here. It is, **“An Act to amend an Act,”* [*811 &c., “for the uniformity of process in personal actions.” But under such a title there may well be a clause introduced to embrace process in ejectment. The preamble to sect. 2 contains nothing which excludes ejectment from the enacting part. And convenience, as it seems to me, requires that ejectment as well as other forms of action should be included, and not that, in the same action, there should be process of execution for costs returnable immediately, and an *habere facias possessionem* not so returnable. We are informed that in recent practice it has been usual to make the *fi. fa.* for costs in ejectment returnable immediately; and the *habere facias possessionem* ought to be so too.

COLERIDGE, J.—If the enacting clause were such that inconveniencies and legal inconsistencies would result from giving it the plain construction, limited words in the preamble might be looked to as a ground for construing the enactment differently. But the mere circumstance that general words are preceded by a limited preamble is not of itself a reason for giving a limited construction to those words. Sometimes a general preamble is followed by a limited enactment, sometimes a limited preamble by a general enactment, as here. No necessary conclusion results in either case. The argument as to purchases of land is answered by the suggestion of my brother Erle, that the purchaser may look for the judgment.

ERLE, J.—The enactment that “all writs of execution” may be made returnable immediately seems conclusive, *if we look to the plain [*812 words. It is argued, however, that the enactment forms part of a general code which refers to personal actions only. But this is not so. The Act for uniformity of process, 2 W. 4, c. 39, is confined, in the preamble of sect. 1, to personal actions; the actions regulated are, in subsequent clauses, mentioned as “such actions:” and the writs to be issued are described as “issued by authority of this Act.” The language of reference which pervades that statute is not adopted in stat. 3 & 4 W. 4, c. 67: there is not here any limitation by reference; and convenience, as well as the wording, appears to me entirely against the proposed limitation.

CROMPTON, J.—I am of the same opinion. As my brother Coleridge has observed, there can be no reason to suppose that the jury process is not returnable immediately under sect. 2; and I think that the writ of possession was meant to be so too.

Petersdorff was then heard on the merits.

Rule discharged.(a)

(a) See Reg. Gen. Hil. XVI. Vict., tit. "*Writs of execution*," Forms 23, 24, 25, 1 E. & B. III. iv.; Chitt. Forms, 550—552, 7th ed.

END OF TRINITY TERM.

*813]

*TRINITY VACATION.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

TETLEY v. TAYLOR. *June* 14.

Reported, 1 E. & B. 521, 532 (E. C. L. R. vol. 72)

BOSTOCK v. SIDEBOTTOM. [*April* 30.]

Lands, partly adjoining a river, were demised for 999 years, by indenture, in which the lessor granted to the lessee liberty to cut a goit or sluice out of the said river, at a proper and convenient distance above a certain weir, in the most convenient line through certain closes (named) of the lessor, into a close, intended for a mill dam, part of the demised lands; and from time to time and at any time to turn the water of the river through the said goit: And liberty, from time to time, and at all times during the term, to view, examine, carry, and lay down materials, and repair and amend the said goit or sluice (and other works specified), when so made as aforesaid, or any of them, when and as often as need or occasion should be, making reasonable satisfaction to the lessor, his heirs and assigns, for all damage to be done or occasioned thereby to the grass or herbage of the lessor, &c.: And the lessee covenanted that he, his executors, &c., would make reasonable satisfaction to the lessor, his heirs and assigns, for all damages to be occasioned to the lands of the lessor by the lessee, his executors, &c., in exercise of any of the liberties, privileges, and powers by the indenture granted, except for the term of two years next ensuing the commencement of the rent, during which time no trespass or damage should be charged or paid for.

In an action of trespass against the lessee for widening a goit on the lessor's soil to the extent of nine additional feet, the defendant pleaded that the goit was made, viz. on, &c. (a day named), in due exercise of the liberty above mentioned, but that, the same not having been made of a sufficient width, and completed to a small and insufficient width only, viz. nine feet, so that, without widening it as after mentioned, defendant could not enjoy the demised tenements as he was entitled by the indenture to do, he, on, &c., in further due exercise, &c., cut down the sides of the goit and widened it: justifying the alleged trespasses.

Replication: that, before the expiration of two years, &c., and before the times when, &c., viz. on, &c., the lessee, in due exercise of the liberty, &c., made and completed a goit, being the goit in the plea mentioned, of the width therein mentioned; and the same remained and was used by the lessee continually from the last-mentioned day until defendant, under colour of the indenture, committed the alleged trespasses.

Held by the Court of Queen's Bench, on demurrer to the replication, that the privilege given to defendant by the deed was to make a goit once only, and that, after having completed a goit,

he could not justify entering plaintiff's land again and widening the goit from nine feet to eighteen: For that the power to make a goit was exhausted, and the widening was not a repairing or amending within the meaning of the deed. Judgment for plaintiff.
Judgment of Queen's Bench affirmed in Exchequer Chamber.

TRESPASS for breaking and entering plaintiff's close at Mottram in Longdendale, Cheshire, called The Em Meadow, and cutting down the sides of a *sluice, goit, or watercourse there, and widening the said goit, viz., to the extent of nine feet, and keeping the same [*814 so widened from thence hitherto, &c.

Plea. That, before and at the time of the making of the indenture after mentioned, one John Bostock, therein described, &c., since deceased, was seised in his demesne as of fee of and in a close therein mentioned, called The Em Meadow, being the close mentioned in the declaration, and of a certain other close in the said indenture mentioned, called Lime Field, and of the several parcels of land hereinafter mentioned to have been demised by the said indenture; and had full power, &c., to grant all and singular the liberties, privileges, and powers hereinafter mentioned to have been granted by the said indenture. And, the said J. B. being so seised and entitled, heretofore, viz., on 12th July, 1800, by indenture then made between the said J. B. of the one part, and one William Sidebottom and one George Sidebottom of the other part (profert), the said J. B., for the consideration therein mentioned, did demise, lease, &c., to the said W. Sidebottom and G. Sidebottom, their executors, administrators, and assigns, a certain piece of land in the indenture described as being parcel of certain closes of the said J. B. called Higher Croft and Lower Croft, and a certain other piece of land in the said indenture described as being parcel of Lower Croft and of certain other closes of J. B. called Great Broadbottom and Great Meadow, and as being intended for a mill-dam or reservoir; and also a certain part (in the indenture described as lying on the westerly side of *the said demised piece of land parcel of Higher Croft and Lower Croft) of the watercourse or bed of a river called [*815 the Mersey: And also full and free liberty, &c., to make, build, erect, and fix a weir or dam in, through, and across the said river anywhere opposite to and adjoining to the said Em Meadow, but not so as to injure a certain county bridge, &c., or to hinder the water from flowing down the tail goit of a certain mill situate, &c., belonging to one John Marsland, on the level on which it then flowed: "Also full and free liberty, privilege, power, or authority to cut a goit or sluice out of the said river at a proper and convenient distance from and above the said weir in the said most convenient line or direction through the said close called the Em Meadow, and the said other close of the said J. Bostock deceased called The Lime Field, into the south-westerly side or end of the said plot, piece, or parcel of land," in the indenture described as intended for a reservoir: "and also to make, erect, build, and fix a

fender or shuttle at the mouth of such goit or sluice, and also to make, erect, build, and fix a bye wash or waste gate at or by the side of such goit or sluice in any part of the same close called The Em Meadow, and cut a drain from such bye wash or waste gate into the said river; and from time to time and at any time to turn and divert the water of the said river into and through the said fender and goit or sluice, and also into and through the said bye wash or waste gate and drain, or any of them:" Also full and free liberty, &c., to make and from time to time repair a drain from a certain other close of J. B. called The Bank to and into the said piece of ground parcel of Higher Croft and Lower *816] Croft, and to turn half the water of a certain *spring rising in the said close called The Bank into and through the said drain for the use of the last-mentioned piece of land, &c.: "And full and free liberty," &c., "from time to time, and at all times during the term by the said indenture granted, to view, examine, carry, and lay down materials, and repair and amend the said weir or dam, and also the said goit or sluice, fender or shuttle, bye wash or waste gate and drains, when so made as aforesaid, or any of them, when and as often as need or occasion should be and require, making reasonable satisfaction to the said J. B. deceased, and his heirs and assigns, for all damage to be done or occasioned thereby to the grass or herbage" of the said J. B., his heirs or assigns, as thereafter particularly mentioned. Habendum to W. and G. Sidebottom, their executors, administrators, and assigns, for a term not yet ended, viz., 999 years from the date of the indenture, yielding, &c., the yearly rent of 84*l.*, payable half-yearly; the first payment on 12th November, 1801. And W. and G. Sidebottom, the lessees, covenanted to J. B., his heirs and assigns, that they, the lessees, their executors, administrators, and assigns, should and would make reasonable satisfaction to J. B., his heirs and assigns, for all damages to be done or occasioned to the lands of J. B. at or near Broadbottom aforesaid by the lessees, their executors, &c., from time to time, in exercise of all or any of the liberties, privileges, and powers by the said indenture granted, "save and except for the term of two years from next ensuing the commencement of the said rent, during which time no trespass or damage should be charged or paid for." And also that W. Sidebottom and G. Sidebottom, their executors, administrators, *817] or assigns, should and would, within four years from the *date of the indenture, at their own proper costs, erect, build, &c., or cause and procure to be erected, built, &c., on the demised piece of substantial building or buildings, and keep the same in tenantable repair land parcel of Higher Croft and Lower Croft, one or more good and so as to be always of the clear yearly rent of 170*l.* at the least; and that such building or buildings should always consist of good brick or stone, oak or fir timber, and covered with slate. "And also that they, the said W. S. and G. S., their executors, administrators, and assigns,

should and would arch or otherwise cover over the said goit or sluice so to be cut and made through the said Em Meadow and Lime Field as aforesaid, save and except for the distance of twelve yards in length next adjoining the said intended bye wash or waste gate, with good stone or brick, and afterwards cover the same again with soil so as to make the same into good arable or mowing land or ground, and should and would, from time to time, and at all times thereafter during the said term by the said indenture granted, keep and continue the said goit or sluice so covered with soil in a good and workmanlike manner." As by the said indenture, &c.

The plea then stated that the lessees, viz., on 12th July, 1800, entered and were jointly possessed, &c., and entitled to the said liberties, privileges, &c., for the said term; and that, they being so possessed, &c., afterwards, and during the said term, in pursuance of the indenture, and within the time thereby required, viz., on, &c., divers buildings were erected and built on the land parcel of Higher and Lower Croft as required by the indenture: that one lessee died, and the survivor, by his will, bequeathed the residue of the term to a *party who became possessed and entitled under the will, and bequeathed the [*818 then residue of the term to defendant. And that, upon his death, viz., on 1st March, 1849, defendant, under the last-mentioned will, became and was possessed of the demised tenements, &c., and entitled to the said liberties, privileges, &c., therewith granted, for the residue of the term, and continued so possessed, &c., until and at the times when, &c.

The plea then averred that, defendant continuing so possessed, &c., and entitled, &c., and a certain weir or dam having been, before then and after the making of the said indenture and during the said term, to wit, on the said 20th December, A. D. 1850, under and by virtue of the said indenture and in the due exercise of the said liberties, privileges, and powers, made, built, and fixed, and, at the said times when, &c., being and continuing so built, &c., in, through, and across the said river Mersey at such part or place, &c., and in such manner as by the said indenture was required as aforesaid, "and a certain goit or sluice (being the same sluice, goit," &c., in the declaration mentioned) "having also been, before then and after the making of the said indenture and during the said term thereby granted, viz., on the said 20th December, A. D. 1850, under and by virtue of the said indenture, and in the further due exercise of the said liberties," &c., "cut and made to and of such width as hereinafter in that behalf mentioned out of the said river Mersey, at such distance from and above the said weir, and in such direction and through such closes as in the said indenture on that behalf mentioned and required as aforesaid, into the south-westerly side or end of the said plot, piece, or parcel of ground in the said indenture mentioned, and therein described as intended *for a reservoir as aforesaid, but the said sluice, goit, or watercourse not having been [*819

and not being, at the said times when, &c., or any of them, cut or made to or of a sufficient width, and the same having been and being then completed and cut and made to and of a certain small width only, viz., the width of nine feet, and such width being a wholly insufficient width in that behalf, so that without widening the said sluice, goit," &c., "to the extent hereinafter mentioned, and keeping and continuing the same so widened, the said defendant could not have or enjoy the use and benefit of the said demised tenements with the appurtenances, and of the said water of the said river Mersey, in so free and ample a manner as he otherwise might and could and then ought and was entitled to have and enjoy, and still might and is entitled to have," &c., "under and by virtue of and according to" the said indenture, and "defendant being then able and ready and willing, upon the said sluice, goit," &c., "being so widened as aforesaid, to cover over the same, save and except as in the said indenture in that behalf is excepted, with good stone or brick, and afterwards cover the same again with soil so as to make the same into good arable or mowing land or ground, and to keep and continue the same so covered," &c., "he, the said defendant, at the said times when, &c., for the purpose of so widening and amending the said goit as aforesaid, and in the further due exercise of the said liberties, privileges, and powers by the said indenture granted, did enter the said close of the plaintiff called The Elm Meadow, and did then, for the purpose aforesaid, cut down the sides of the said sluice, goit," &c., "there, and did then widen the said sluice, goit," &c., "from the said *820] then insufficient width of the same as aforesaid to a certain proper and reasonable width in that behalf, in the whole not exceeding the width of which the defendant then was and still is entitled to have the same" under the said indenture, according to the tenor, &c., thereof, "for the having and enjoying by him the said defendant of the use and benefit of the demised tenements with the appurtenances, and of the said water of the said river Mersey, in such free and ample manner as aforesaid, to wit, to the extent in the said declaration in that behalf mentioned; and kept and continued the same so widened" for the time in the declaration in that behalf mentioned, doing no unnecessary damage, &c., and as it was lawful, &c. : which are the same alleged trespasses, &c. Verification.

Replication. "That, after the making of the said indenture, and before the expiration of two years from and next ensuing the commencement of the said rent in the said indenture mentioned and reserved, and during the said term thereby granted, and long before any of the said several times when, &c., viz., on the 1st day of August, A. D. 1800, the said William Sidebottom and George Sidebottom in the said indenture mentioned, then being, under and by virtue of the said indenture, possessed of the said demised tenements with the appurtenances in the said indenture mentioned, and entitled to the said liberties, pri-

vileges, and powers thereby granted, under and by virtue of the said indenture and in the due exercise of the said liberties, privileges, and powers, cut, made, and completed a certain goit out of the said river Mersey in the said indenture and in the said plea mentioned, and at such distance from and above the said weir in the said indenture and in the said plea mentioned, and in such direction, as in the said indenture mentioned and required, and through the said closes in *the said indenture and in the said plea in that behalf mentioned, the said [*821 goit being the same goit, sluice, or watercourse in the declaration and in the said plea in that behalf mentioned; and which said goit, when so cut, made, and completed as aforesaid, was of a certain width, to wit, the width in the said plea in that behalf mentioned; and then arched and covered over the said goit according to their covenant in that behalf in the said indenture contained: And the plaintiff further saith that, the said goit being so then cut, made, and completed as aforesaid, and being so then arched and covered over as aforesaid, and then being of the width aforesaid, remained and continued so arched and covered over as aforesaid and of the width aforesaid during all the time next hereinafter mentioned, and in that state and condition was used and enjoyed by the several persons from time to time possessed of the said demised tenements with the appurtenances and entitled to the said liberties, privileges, and powers so therewith granted as aforesaid, from the said 1st day of August, A. D. 1800, continually until the defendant on the said 20th day of December, A. D. 1850, he then being so possessed and entitled as last aforesaid, under colour of the said indenture, and in pretended further exercise of the said liberties, privileges, and powers thereby granted, broke and entered the said close," &c., and then cut down the sides of the said sluice, goit, &c., and widened the same, and kept and continued the same, &c., in manner and form, &c. Verification.

Demurrer, assigning causes which will appear sufficiently by the argument. Joinder.

Maynard, for the defendant.—The replication is no *sufficient answer to the plea. It admits that the defendant was originally [*822 entitled to make a goit of the dimensions to which he has now widened it; and the question raised by the replication and demurrer is, whether the defendant, having once exercised the power of making a goit under the indenture, but finding it insufficient, can now enlarge it to the size of which it might have been made at first, rendering compensation, of course, as more than two years have elapsed since the "commencement of the said rent." It may also perhaps be questioned, on the other side, whether the enlargement might be made after the lapse of a great number of years. [Lord CAMPBELL, C. J.—What time would be sufficient to exclude the power?] The replication says nothing of a reasonable time having expired; nor is there anything on the pleadings which

obliges the Court to notice that any given time has elapsed since the goit was made. The day of making it is only formally stated in the plea; and the replication avers nothing to fix it more exactly. The first question, then, is the only one. [Lord CAMPBELL, C. J.—It appears so to me at present. ERLE, J.—The goit having been once completed to the tenant's satisfaction, could he come in again and remake it?] The pleadings show that he had never completed it to the full extent of his power. [Lord CAMPBELL, C. J.—Had not he once done all that he then intended to do?] The compensation covenant may be enforced; but, subject to this, the defendant might use the privilege of repairing or amending the weir and goit as occasion required, without being a trespasser. [CROMPTON, J.—The covenant you cite refers, apparently, to a set of powers which may be exercised from "time to time." Is not it confined to those? Lord CAMPBELL, C. J.—What *823] you claim to do is not to repair *but to remake.] If the original lessees had not completed the goit to the full length, their assigns might have come in and finished it. [Lord CAMPBELL, C. J.—In the case you put, it would not have been made in the first instance.] Where powers of this kind have been given by Act of parliament, which fixes no period for completing the proposed work, it has been held that a Court of law cannot limit the time at which the work may be resumed after having been suspended; *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472.† Lord Abinger said there: "I do not say that a Court of equity might not interfere in such a case, but a Court of law cannot. A Court of law must construe this Act now as if it were the day after the Act passed." That, in principle, applies here. [Lord CAMPBELL, C. J.—There the Act was for making a canal from Kirkby Kendal to West Houghton, and a canal had never been made from one of those points to the other: the canal therefore was not complete. You have made a complete goit, so as to take the water from the river and bring it back again. ERLE, J.—You put the case as if an experimental goit might be made in the first instance, and, after experiment, an alteration introduced.] In *Dand v. Kingscote*, 6 M. & W. 174,† coal mines were reserved by a deed executed in 1630 "with sufficient wayleave" to and from the mines, and liberty of sinking pits for winning of coal, &c.; and it was held that under this reservation the defendant might lay down railways for the more convenient getting of the coal, though such ways were not in use at the date of the deed. [Lord CAMPBELL, C. J.—The terms of reservation there gave power to make all manner of ways. ERLE, J.—A power of the description of a *824] "wayleave," appurtenant to a mine, would be adapted *to the state of the mine de anno in annum.] The claim here stands upon a similar ground. The goit, as now made, is not wider than is necessary for the purposes contemplated at first. [Lord CAMPBELL, C. J.—You are confined here by an express power.] The goit was never

such as to answer its purpose. [Lord CAMPBELL, C. J.—Is not the fair meaning of the replication that you were satisfied with the goit as it was first made?] A contrary inference may be drawn from the statements. In *Bishop v. North*, 11 M. & W. 418,† one point urged against the defendants was that “they have already made one railway to the canal under the power given by the Act; and having exercised that power, they cannot abandon that railway and make others. They may have the power to make one railway but not an infinite number of railways.” But the Court gave their certificate for the defendants. [WIGHTMAN, J.—If the lessees had not at first cut their goit in the most convenient line, could the defendant have altered that?] He might, subject to the compensation clause. The goit has been made too narrow, and is now widened. If it had been too wide at first and the defendant had narrowed it, would he have been a trespasser? The right to do either act was incident to the grant; as, in *Hodgson v. Field*, 7 East, 613, the grant of liberty to a proprietor of coal mines to make a sough through the grantor’s land was held to carry with it, as incident, the right of repairing the sough, and doing all necessary things for that purpose, from time to time. Yearb. Mich. 9 Ed. 4, fol. 85 A, there cited, is to the same effect.

J. A. Russell, contrà.—The suggestion that the goit, *as first made, might be an experiment, is inconsistent with the dates of [*825 the making and widening, as shown by the replication. [Lord CAMPBELL, C. J.—The time is not alleged so as to be material.] At all events, if the goit was once made of a width which appeared sufficient at the time, and was used, the lessee could not afterwards come in and widen it: his power was gone. The user showed that the goit had been finished as was intended, and that the lessee was satisfied. The rule of law is that “every grant shall be expounded as the intent was at the time of the grant;” *Mildmay v. Standish*, Cro. Eliz. 34, 35. Here nothing shows an intention at that time, justifying the claim of the defendant. The deed does not contain any covenant by the lessee to build mills, or to do anything by which the goit would become a benefit to the reversion. The lessee is bound to build certain houses; and he has simply liberty to make a goit. Suppose a goit had been made in which a wheel of fifty horse power could be worked, and the lessee afterwards, in consequence of increasing business, required a wheel of twice the power; could he at any time enlarge the goit in proportion? The power granted is to make “a” goit; and the individual goit, when made, is to be covered in as the deed directs: and that has been done. The liberty to “repair and amend” from time to time, supposing it incident to the grant, does not assist the defendant. “Repair” and “amend” are synonymous. The tenant amends by repairing. And the words “to view, examine, carry, and lay down materials,” which accompany the provision for repairing and amending, show that no-

thing more than a repair in the ordinary sense was meant. [Lord *826] CAMPBELL, C. J.—Mr. *Maynard* *contends that the identity of the goit is not destroyed by the widening.] A goit eighteen feet wide is not a goit of nine feet amended; it is a different work. The clause as to compensation after two years was introduced, not to increase the rights of the grantee, but to protect the grantor; a protection which he would need, if the right to enter and amend was incident to that of having the goit. The making of the goit once exhausted the power; the only continuing right was that of keeping it repaired and in working order: if that were not so, no period could be assigned at which the right to make alterations should cease. In *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472,† the canal originally proposed had never been completely made. In *Dand v. Kingscote*, 6 M. & W. 174,† the grant had express reference to the working of certain mines. [Lord CAMPBELL, C. J.—And it did not limit the grantee to a single line of way.]

Maynard, in reply.—The goit appears by the record to have been completed, not wholly, but to a certain extent only. [WIGHTMAN, J.—The replication says that it was completed within the two years.] No point of time is fixed. [Lord CAMPBELL, C. J.—It is shown to have been a time before the cause of action accrued.] The time when the cause of action accrued is left at large: the replication does not identify it with the time assigned in the plea. If the power was exhausted as soon as the goit was finished, it must be said that the grantee could not have made any alteration in its width in the next week or the next day.

*827] *Lord CAMPBELL, C. J.—The plaintiff is entitled to our judgment. The license given by the deed is to make a goit, and to make it once: when it has been once made and completed, there is no power to make another. It is not as where liberty is given to do a thing toties quoties, as to make roads: the lessees are to make “a” goit: and the replication shows that that power has been once exercised and is exhausted. The count, in trespass quare clausum fregit, is answered by a plea in which the defendant relies upon his power to make a goit: the replication states that the lessees, before the several times when, &c., “under and by virtue of the said indenture and in the due exercise of the said liberties, privileges, and powers, cut, made, and completed a certain goit out of the said river Mersey in the said indenture and in the said plea mentioned, and at such distance from and above the said weir in the said indenture and in the said plea mentioned, and in such direction, as in the said indenture mentioned and required, and through the said closes in the said indenture and in the said plea in that behalf mentioned.” That is, in effect, an allegation that the power has been exercised once, and is gone. The power to repair and amend was not power to make another goit; and the goit,

as described by the pleadings, was another. If Mr. *Maynard* could have shown, as he did almost contend, and must, I think, have shown in order to succeed, that the indenture gave a power to be exercised from time to time in any direction during the nine hundred and ninety-nine years, the case might have been different: it might then have been that the goit might have been varied in width as well as in direction: but the license, as set out, is "to cut a goit or sluice out of the said river at a proper and *convenient distance from and above the said weir in the said most convenient line or direction [*828 through the said close called *Em Meadow*, and the said other close," &c., "into the south-westerly side or end of the said plot, piece, or parcel of land," &c. That is not the license claimed for the defendant. Under the terms here used, the goit having been once made, the power cannot be exercised again in making another. The cases which were cited are not in point. In *Thicknesse v. The Lancashire Canal Company*, 4 M. & W. 472,† the canal had never been completed to the whole extent when the work complained of was done. And in two other cases which were mentioned, there was, substantially, a power granted to make roads toties quoties. The replication, therefore, in this case, is a good answer to the plea.

WIGHTMAN, J.—Looking to the terms of this indenture in the clauses which relate to making and amending the goit (his Lordship here read them), I think it contemplates only the making of one goit, once for all; not an experimental goit, but one only, to be repaired from time to time, compensation being made for what is done after the lapse of two years from the commencement of the rent. According to the plea, a goit was completed, cut, and made under the powers given by the indenture; and it appears by the replication that the goit was so completed within two years from the commencement of the rent, and is the same goit which is mentioned in the declaration and in the plea. A goit having been completed, cut, and made within those two years, the powers were then exhausted, except as to the liberty to repair and amend.

***ERLE, J.**—The power of making a goit was to be exercised once for all; the power to repair and amend might be acted [*829 upon from time to time; but I think this last privilege did not include the right of constructing a goit of a different width. The clause as to compensation after two years, in my opinion, shows the intention of the parties. When the grantees were at the expense of making new works, they were to have the liberty of doing so without rendering compensation; but, after the works were once completed, then, if damage was done by coming in to repair, satisfaction was to be made.

CROMPTON, J., concurred.

Judgment for plaintiff.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

SIDEBOTTOM v. BOSTOCK. *June 14.*

For syllabus, see p. 813, ante.

THE defendant in the preceding case brought Error on the judgment of the Court of Queen's Bench. The plaintiff below joined in Error. The case was now argued in the Exchequer Chamber.

Collier, for the plaintiff in error (defendant below).—The plaintiff below admits by his replication that the goit, as originally constructed, was insufficient. He ought to have traversed this allegation in the plea, or at any rate to have new assigned. The averments as to time are *830] immaterial: the plaintiff below must therefore contend that the goit could not be made sufficient, even on the day after it was constructed in the insufficient state. The grant clearly contemplates the continuance of the power for a certain time. Four years are given to the grantees for completing the buildings which they are bound to erect. For two years, the powers granted may be exercised without making compensation. Where a privilege like that in question is granted, the exercise of it is not limited to the state of things existing at the time of the grant. That principle seems to be assumed in *Senhouse v. Christian*, 1 T. R. 560: it clearly was so in *Dand v. Kingscote*, 6 M. & W. 174.† And this is in accordance with *Luttrell's Case*, 4 Rep. 86 a, and *Hall v. Swift*, 4 New Ca. 381 (E. C. L. R. vol. 33). *Bishop v. North*, 11 M. & W. 418,† is an authority against the restriction for which the plaintiff below contends. [JERVIS, C. J.—Is not it admitted that the goit has been once completed?] Completed insufficiently for the purpose contemplated. In *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472,† there being no time limited for the exercise of the statutory powers of a canal company, it was held that they were entitled to carry the canal forward from time to time, to the extent contemplated in the Act. The only difference between that case and the present is an extension in length and an extension in breadth. [ALDERSON, B.—The difference is between completing and not completing.]

J. A. Russell, contra, was not called upon.

*831] JERVIS, C. J.—Power is given to construct a goit; *and the work is performed accordingly. Had it been intended that this might be done over and over again, provision should have been made for the purpose.

CRESSWELL and TALFOURD, Js., concurred.

PARKE, B.—The plaintiff in error is endeavouring to impose upon the land of the grantee a servitude much more onerous than that which the grant concedes. To allow a man to construct a goit over your land is a very different thing from allowing him to do so from time to time.

ALDERSON and PLATT, Bs., concurred.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

OSTLER v. COOKE and Others. *June 15.*

A local drainage Act created the lords or ladies of three manors, or, in his, her, or their absence, their agents appointed in writing under their hands, commissioners for executing the Act; it authorized the commissioners to take lands for the purposes of the drainage; and it contained clauses for that purpose to the same effect as those in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), subsequently passed: And it provided that no person should be capable of acting as a commissioner or agent for a commissioner till he had made a declaration that he would duly execute the powers in the exercise of which he should act as commissioner or agent.

The three lords of the manors, by writing under their hands respectively, appointed the defendants their agents; but without having first made the declaration. The defendants acted as commissioners (first making the declaration), and gave plaintiff a written notice that they required to take, for the purposes of the Act, 3 acres, 1 rood, 25 perches, of his land; describing the specific acres, rood, and perches. Plaintiff refused to treat; and the commissioners thereupon issued a warrant to the sheriff of the county to summon a jury to assess the sum to be paid to plaintiff for the purchase of 3 a. 1 r. 25 p. of land, required for the purposes of the Act; but the warrant did not recite or refer to the notice, nor describe specifically which 3 a. 1 r. 25 p. were required. Plaintiff had two hundred acres of land in the district. Both the notice and warrant were in the defendants' names as commissioners. A jury was impanelled, and assessed the price of 3 a. 1 r. 25 p. pointed out to them, which were in fact the same land specifically described in the notice. An inquisition was drawn up, reciting the warrant but not the notice, and not showing specifically in respect of which 3 a. 1 r. 25 p. of plaintiff's land the price was assessed. Plaintiff, who had throughout protested against the proceedings, refused to receive the price so assessed. Defendants paid it into the Bank (under a section in the Local Act enabling them so to do), and entered on the land. Plaintiff having thereupon brought an action against them:

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench,

That the lords and ladies of the manors were commissioners by virtue of the local Act, and, if they did not choose to officiate, might appoint agents for such time as they thought proper; which agents thereupon became commissioners, and might issue notices and warrants in their own names, and were not bound to show on the face of their proceedings for what lord or lady they respectively acted.

That such appointment of an agent was well executed though the lord or lady had not previously made the declaration required by the local Act.

And that the inquisition was good, though it did not, directly or by reference, specify the particular acres, rood, and perches for which the commissioners were to pay.

AFTER the decision of the Court of Queen's Bench in this case (*Ostler v. Cooke*, 13 Q. B. 143), the *special case was turned into a [*832 special verdict according to the liberty reserved; and judgment was entered for the defendants on all the issues except the first. (a) The statements in the verdict did not vary from those of the special case in any respect material to this report. (b) The plaintiff brought Error in the Exchequer Chamber, the grounds specially assigned being: That the defendants had no authority under stat. 6 & 7 Vict. c. lxxvi., local

(a) The judgment of the Court in *Ostler v. Cooke*, 13 Q. B. 143, 163 (E. C. L. R. vol. 66), appears to have been given for the plaintiff on the fifth as well as the first issue, as there stated: but judgment was entered up as in the text, above.

(b) "1843" in 13 Q. B., p. 147, l. 9, appears to be a mistake for 1845. The latter date is given in the special verdict.

and personal, public, to enter upon the closes, &c., in the declaration mentioned, and take the land of the plaintiff: that the proceedings under which they so entered were irregular on the face of them: and that judgment was erroneously given for the defendants on the 2d, 3d, 4th, and 6th issues. Joinder.

*833] *The writ of error was now argued, before Maule, Cresswell, Williams, and Talfourd, Js., and Parke, Alderson, and Platt, B.

Sir F. Theiger, Attorney-General, for the plaintiff.—First, the defendants had no title to act as commissioners; and this defect vitiates the whole of the proceedings. Sect. 1 of stat. 6 & 7 Vict. c. lxxvi. enacts that, for the purposes there pointed out, certain individuals shall be, and they are thereby appointed, commissioners. Power is given to them to nominate agents; but they cannot withdraw themselves from being commissioners: they must, in the commencement, take up that character. Here the commissioners never made the declaration prescribed by sect. 2,(a) nor have they done any official act except that of nominating agents. But to do that act itself they ought to have clothed themselves with authority by making the declaration, which, as set out in schedule (B.), promises due execution of “all the powers and authorities in the execution whereof” the party “shall at any time act as a commissioner.” It may not be necessary that the agent should *834] *be appointed pro hac vice whenever he acts; there may be a standing appointment: but the statute contemplates that the commissioner will act sometimes; and he should be qualified. The words “in his, her, or their absence,” in sect. 1, do not imply that the commissioner shall retire altogether. The powers are important; and it must have been intended that, to some extent at least, the commissioners should exercise them personally, though their nominees may act in their “absence.” [CRESWELL, J.—It can hardly have been expected that they should discharge all the functions themselves, because ladies of manors may be commissioners. ALDERSON, B.—The lords may be minors.] In many parts of the Act a plain distinction appears between commissioners and agents. By sect. 165, “commissioners” is defined as meaning “the commissioners appointed under” “this Act.” Sect. 10 vests all the works there mentioned in “the said commissioners,” and empowers them to bring actions and prefer indictments. This cannot apply to agents; nothing requires that they should

(a) Stat. 6 & 7 Vict. c. lxxvi. s. 32, enacts that, in any action against the commissioners, or any of the persons acting in the execution of this Act, for any matter or thing arising out of the Act, the qualification of the commissioners, and the appointment of clerks, treasurers, collectors, superintendents, or other persons appointed by the commissioners under the authority of this Act, shall, upon the trial of such action, stand admitted in evidence, unless the party against whom it would be evidence shall have given notice, at the time and in the manner pointed out by this section, that he intends to dispute such qualification or appointment. The special verdict stated “that, the said plaintiff not having given the notice required by sect. 32 of the said Act, a

have a standing appointment; and, if they are only nominated occasionally, the property cannot vest and re-vest as changes take place: it must remain in the commissioners. [MAULE, J.—In their absence are not the agents “the commissioners”?] Sect. 2 forbids acting either “as a commissioner or as an agent of a commissioner” without having made the declaration. These distinctive words are idle if the two offices are identified. Sect. 3 imposes a penalty if “any commissioner shall act before he shall have made the said declaration, or if any person, not being duly qualified, shall act, or shall appoint an agent or deputy who shall act in the execution of this Act.” Sect. 4 does not remove the *objection: it merely prevents the annulling of acts [*885 done at a lawful meeting of commissioners if an unauthorized person happens to have been present. [ALDERSON, B.—The person himself is punishable under sect. 3. PARKE, B.—The intention probably was to punish the unauthorized individual without invalidating the act.] That is so. There could be no act of a meeting at all unless more than one qualified person were present: but, where that is the case, the act is not to be invalidated because an unqualified person attended. The argument here, which sect. 4 does not meet, is, that if the principal has not power to act he has not power to make a deputy.

Secondly, the agents here ought to have shown in their proceedings for what commissioners they respectively acted. That does not appear; but the defendants act in their own names as commissioners. This is material, if the distinction pointed out, between the commissioners and their agents, be correct.

Thirdly, the proceedings are defective in not specifying the parcels of land which are to pass. This is evidently necessary where the lands to be taken are part of a larger quantity. The notice to treat, here, does describe the parcels; but the warrant, which is the sheriff's authority to summon a jury, neither specifies the parcels sufficiently nor refers to the notice. The inquisition refers to nothing but the warrant, and does not denote the parcels, further than by that reference. Yet, by sect. 87,(a) the inquisition is the judgment which is to be recorded and filed with the clerk of the peace, and to be the evidence of the transaction. [MAULE, J.—The *plaintiff might be at a loss [*886 hereafter to make title to the rest of the land, because some one might say: “How do we know that any three acres are not those included in the inquisition?”] That was suggested in the Court below. [MAULE, J.—Is the notice recorded in any way?] It is not. This case differs from *Taylor v. Clemson*, 2 Q. B. 978 (E. C. L. R. vol. 42),(b) where it was held that the existence of a disagreement, which was a

(a) 13 Q. B. 166 (E. C. L. R. vol. 66).

(b) Judgments in Q. B. and Exchequer Chamber affirmed in Dom. Proc., *Taylor v. Clemson*, 11 Cl. & Fin. 610.

fact essential to the jurisdiction of the sheriff and his jury, might be inferred from the warrant and inquisition, though not expressly averred in them. There the parcels were carefully set out in the inquisition: the objection therefore arising in this case, and which is supported by the decision on the ninth point in *Rex v. Manning*, 1 Burr. 377, did not exist. [PARKE, B.—In *Taylor v. Clemson*, 11 Cl. & Fin. 651, Lord Cottenham laid it down “that the inquisition or other proceeding need not state any matter not cognisable by the authority whence such proceeding emanates.”] That the sheriff is not bound to state facts within the cognisance of other parties, and of which he is not obliged to receive proof: but the parcels for which purchase-money is to be assessed under this act are within the cognisance of the sheriff, and he is bound to know them. The inquisition is a statutory conveyance, under which, on deposit of the purchase-money, the land vests absolutely without any further proceeding, as appears by sect. 63.(a)

Another objection is that, as the verdict expressly states, no precept *837] for delivery of possession has been issued to the sheriff, under sect. 73,(b) [MAULE, J.—If the land is vested in the commissioners by payment into the Bank under sect. 63, they do not require a precept for the purposes of this action.]

Bramwell, contra, was stopped by the Court.

PARKE, B.—We are all of opinion that the judgment of the Court of Queen’s Bench is right.

The first question is whether the defendants are entitled to defend as “commissioners.” It is true that the first section of the Act appears somewhat inartificial, especially when its clauses are coupled with the Schedules. But we are of opinion that, substantially, the Act constitutes the lords or ladies of the manors commissioners, and that, if they do not choose to act, but absent themselves, they may appoint their agents, who then are commissioners. Sect. 1 expressly enacts that the lords or ladies of the three manors, or their agents appointed in writing under their hands, and which respective appointments may be in the form given by Schedule (A), “shall be and are hereby appointed commissioners for executing this Act.” Looking at the situation of life of the persons first mentioned, it might be supposed that they probably would not act in person. The form in the Schedule is, indeed, not very well adapted to the contemplated state of things; but the use of it is not obligatory; the form is to be that, or as near thereto as circumstances will admit. And the enactments of the statute, not the Schedule, must be looked to. The effect of those enactments is, *that *838] the lords of the manors may transfer their functions to their appointed agents for as long a time as they respectively please, and that

(a) See 13 Q. B. 163 (E. C. L. R. vol. 66).

(b) See 13 Q. B. 164 (E. C. L. R. vol. 66).

the agents are thereby authorized to act as commissioners in their own names.

It is contended that the lords ought first to have made the declaration required by sect. 2. Assuming that to be so, the omission would not make the act of appointment void, but would only subject the person executing it to a penalty. But in appointing agents the lords do not act as commissioners within the meaning of sect. 2.

Then it is argued that the inquisition is bad, because it does not specify the parcels which are to be purchased. It would be more convenient that that should be done; but we do not think that, because it is omitted, the inquisition is void. It is not a parliamentary conveyance: it is only the result of an inquiry for the purpose of estimating the amount to be paid or tendered. As soon as that payment or tender is made, the commissioners may enter: and, if the landowner should fail to make a title, or should be unwilling to convey, the commissioners may deposit the purchase-money as sect. 63 directs; and the land then vests in them. If they entered upon different land from that to which the inquisition applies, the proceeding would be irregular and might be set aside: but here it is apparent that, in fact, the land entered upon is the same with that which was described by metes and bounds in the notice to the plaintiff.

The rest of *The Court* concurred.

Judgment affirmed.

*The following clauses of stat. 6 & 7 Vict. c. lxxvi., not set out in the report of *Ostler v. Cook*, 13 Q. B. 143, 163 et seq., [*839 but cited before the Court of Error, may conveniently be added here.

Sect. 1 enacts as follows: "Whereas certain fen lands and low grounds in the several parishes, hamlets, townships, or places of," &c., "containing in the whole 2720 acres or thereabouts (that is to say), &c.," "or some portions of the said fen lands and low grounds, have been for many years past and still are liable to inundation, and are thereby injured and rendered to a great degree unprofitable to the owners and occupiers thereof respectively: And whereas the said fen lands and low grounds would be greatly improved, and rendered of much greater value to the owners and occupiers thereof, if the same were effectually drained and embanked;" it is therefore enacted: "That from and immediately after the passing of this Act the lords or ladies of the several and respective manors of Bardney, Topholme, and Stixwold aforesaid for the time being (or, in his, her, or their absence, their respective agents, appointed by writing under his, her, or their respective hands, for each of the said manors respectively), and which respective appointments may be made according to the form specified in Schedule (A.) to this Act" (13 Q. B. 145), "or as near thereto as circumstances will permit, shall be and are hereby appointed commissioners for executing this Act: Provided nevertheless, that no person shall be capable of acting as agent for more than one commissioner at one time."

Sect. 2 enacts: "That no person shall be capable of acting as a commissioner or as an agent of a commissioner until he shall have made and subscribed a declaration in the words or to the effect set forth in the Schedule (B.) to this Act" (13 Q. B. 145).

Sect. 3 enacts: "That in case any commissioner shall act before he shall have

made the said declaration, or if any person, not being duly qualified, shall act, or shall appoint an agent or deputy who shall act in the execution of this Act, every such person shall forfeit and pay for every such offence the sum of 50*l.*;" "and the person so prosecuted shall prove that he hath made such declaration, and is qualified as aforesaid, without any other evidence on the part of the prosecutor or plaintiff than that such person hath acted as a commissioner in the execution of this Act, or hath appointed an agent who hath acted in the execution of this Act."

Sect. 4 enacts: "That no act or proceeding of the commissioners shall be impeached or rendered or deemed to be informal by reason of any person not duly authorized to act as a commissioner in the execution of this Act having acted or concurred therein."

Sect. 10 enacts: "That the property of and in the several mills or engines, sluices, tunnels, bridges, culverts, catchwaters, locks, quays, banks, *forelands, drains, *840] watercourses, and other works of drainage and embankment to be erected, raised, set out, cut, made, and used under the authority of this Act, and all tools, implements, timber, and other articles or things provided or made use of for the purposes of this Act, and of and in any land to be purchased by the commissioners in pursuance of the powers herein contained, shall be vested in the said commissioners, who shall have full power and authority and control over the same and every of them; and the commissioners are hereby empowered to bring any action, or to prefer any bill of indictment, against any person who shall injure or damage the same or any of them; and in all such actions or bills of indictment it shall be sufficient to state generally that the article or thing for or on account of which such action shall be brought, or such bill of indictment preferred, is the property of 'The Commissioners for the drainage of the fen lands and low grounds in Bardney,'" &c., "without particularly stating or specifying the names of all or any of the said commissioners."

As to sect. 32, see p. 833, note (a), ante.

Sect. 51 enacts: "That, subject to the provisions of this Act, the commissioners shall have full power and authority to enter into or upon, and to take such of the lands within the several parishes or places aforesaid as it may be necessary or desirable to take for the site of any mill," &c., "watercourse, or other works which may be essential or conduce to the more effectual drainage of the said fen lands and low grounds, and to take and dig earth or soil therefrom, and to cut through such lands for the purpose of making any drains or watercourses, or of altering," &c., any existing drains, &c., which they may deem it necessary to make, alter, &c., and to take and use the lands adjoining the said drains for depositing the earth and soil, &c.; "and to do all such other acts as may be necessary to carry into effect the purposes of this Act, doing as little damage as may be, and making satisfaction to the parties injured thereby; and for that purpose the said commissioners are hereby empowered to agree with the proprietors of and persons interested in any lands which the commissioners shall judge necessary to be dug, cut, used, or entered upon for any of the purposes of this Act, for the purchase or for the temporary occupation of such lands, or for the recompense to be made to such proprietors and persons interested for the damages they may sustain thereby, and also to settle and ascertain in what proportion the sums so agreed for shall be paid to the several persons interested in the premises."

Sect. 165 (Interpretation Clause), enacts that, "The expression 'The Commissioners' shall mean the commissioners appointed under or by virtue of this Act."

*The QUEEN v. The Inhabitants of the County of SOUTH-AMPTON. (Black Bridge.) *June 18.* [*841]

The QUEEN v. The Same. (Sandown Bridge.)

The QUEEN v. The Same. (Tinker's Bridge.)

The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the island, not repairable by tenure, were repaired either by the tithings, parishes, or townships in which they were situate, or from rates levied on all the parishes in the island, under the following circumstances. The island having been assessed to the general county rate, and appeals against such assessment having been entered, an arrangement was made, in 1774, by consent, under an order of Quarter Sessions, fixing certain proportions to be paid by the parishes in the island towards the general county rate, but leaving the expense of bridges and the house of correction in the island to be raised by a local rate; the island being adjudged and declared not to be liable to pay to the county bridge rate or county house of correction; and the inhabitants agreeing to erect and maintain houses of correction and bridges within the island at their own sole expense. After this arrangement, the practice was for the county Quarter Sessions, on the application of the justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the island bridges and bridewell. Till 1842, there had been no instance of the general county rate being applied to the repair of the island bridges. In 1813 stat. 53 G. 3, c. xeli., appointed commissioners for the repair of the highways in the island, with power to make assessments, and enacted that all bridges previously repaired by any parishes, tithings, divisions, or townships in the island should, for the future, be repaired "in such and the same manner, and by such and the same ways and means," "as other bridges" "usually called county bridges" within the island had been accustomed to be repaired. In 1842, and since, the island was assessed generally with the county, and no separate island rate made. Application for the repair of bridges and bridewells in the island had been, since that time, made to the county Quarter Sessions.

Held, that all bridges which, at the time of the passing of the Act, were repairable by the tithings, &c., in which they were situate, were for the future repairable by the county generally; and that the arrangement of 1774 did not affect the legal liability of the county, and was no answer to an indictment against it for non-repair of such bridges.

A bridge in the island, originally repaired by the tithing, was, after the passing of the Act, wholly rebuilt by order of the justices for the island division. The new bridge was larger than the old, and different in form, and stood higher up the stream. The expense of the building and of repairs, were defrayed out of the island rate imposed under the arrangement of 1774. The conditions prescribed by stat. 43 G. 3, c. 59, were not observed in building it.

Held, that the county was liable to repair the new bridge.

A foot bridge formed of three planks, nine or ten feet long, and a hand rail, and which carried a public foot-path across a small stream, was held not to be repairable as a county bridge, though it had been repaired by the commissioners under the above-mentioned local Act.

THESE were indictments for the non-repair of three public bridges, respectively, in the Isle of Wight, *in the county of Southamp- [*842] ton. The defendants pleaded Not Guilty to each. The indictments were tried, by consent, at the Somersetshire Summer Assizes, 1851; and a verdict of Guilty was taken in each, subject to the opinion of this Court upon the following statements of facts; the question in each case being, Whether the inhabitants of the county of Southampton were liable to repair the bridge specified in the indictment. If they were so liable, the verdict was to stand; if they were not liable, the verdict to be set aside and a verdict of Not Guilty to be entered.

BLACK BRIDGE.

The bridge mentioned in the indictment is a stone bridge, used by the public, and erected in 1840 under the circumstances hereinafter mentioned, in the place of an ancient public bridge of wood and stone, which always, before and at the passing of the local Act, 53 G. 3, c. xcii., hereinafter mentioned, had been used to be repaired by the tithing of Knighton, in the parish of Arreton. Before 1842 all the public bridges in the Isle of Wight not repairable by tenure had been maintained and repaired either by the inhabitants of certain tithings, parishes, and places in which they were situate, or by rates in the nature of county rates levied on the inhabitants of all the parishes and places in the island, under the arrangement hereinafter mentioned. From 1774 until 1842 the practice was for the justices of the Isle of Wight division to apply to the quarter sessions of the county of Hants for "a rate in the nature of a county rate;" and thereupon an order of sessions was made, on every parish in the island, for a rate purporting to be for *843] repair of the bridges and *Bridewell in the island, and for other purposes to which such rate was by law applicable within the island. Before 1774 entries in the order books and books of assessment of the general county rate show that rates were at various times made on the several places and parishes in the Isle of Wight; but the sums levied thereon were not uniform. (The case then set out all the entries found in the existing county records, down to 1774, which related to the practice upon the point in question.) These contributions were part of the general county rates, and applied indiscriminately with the contributions of the main land. No instance is known, before 1842, of the application of the general county rate to the repair of an island bridge; but the county justices of the Isle of Wight division were used to expend the island rate in the nature of a county rate, made in the manner above specified, on the objects for which it had been directed to be applied by the county quarter sessions, i. e. "island bridges and Bridewell;" and this was the usage and practice when the local Act above referred to passed. Until very recently there has always been a house of correction or Bridewell for the Isle of Wight in Newport. There is not, nor ever was, a commission of the peace for the island, which is a division of the county of Southampton.

In 1772, the Isle of Wight having been assessed to the general county rate in common with the other parts of the county, appeals against such assessment were entered, which were continued to 1774, when arrangement was made, by consent, at the general quarter sessions, fixing certain proportions to be paid by the parishes in the Isle of Wight towards the general county rate, but leaving other items of expenditure, viz. *844] bridges *and house of correction, to be raised by a local rate; the terms of the order of sessions being the said island be

thereby adjudged and declared not to be liable or subject to pay the county bridge rate or to the house of correction; the Isle of Wight agreeing to erect and maintain, from time to time, houses of correction and bridges within the said island." (The case then set out the order of Sessions, by which it was ordered that, whenever a rate of 3d. in the pound should be made on the county, the proportion to be paid by the Isle of Wight should be 270*l.*; and that the like proportions should be observed in assessing the island to the general rate upon the county more or less than 3d. in the pound, deducting out of such proportion such sums of money as the Isle of Wight ought to have paid to the bridges and houses of correction, had they been liable thereto.)

The magistrates acting for the division of the Isle of Wight did, by and out of the local rate levied exclusively on parishes in the Isle of Wight by order of sessions, and made in the form above stated, from time to time repair such public bridges in the island as were of the nature of county bridges; and, so far as regards general county rate, the proportions settled by order of sessions in 1774, and subsequently in 1819, were alone contributed by the Isle of Wight down to 1842.

There never was any indictment against the county for not repairing bridges in the Isle of Wight previously to 1842, nor any indictment against the inhabitants of the island for such non-repair.

In 1813 a local Act, 53 Geo. 3, c. xcii., (a) was passed *for con- [*845 solidating the management of all roads and highways in the Isle of Wight, and appointing commissioners for that purpose.

Sect. 67 enacts as follows: "That all bridges, drains, and sewers within the said parishes, and places aforesaid, which have, previous to the passing of this Act, been accustomed to be repaired by any parishes, tithings, divisions, or townships, within the said island, shall from and after the 11th day of October, 1813, be for ever repaired and kept in repair in such and the same manner, and by such and the same ways and means, as other bridges, drains, and sewers, usually called county bridges, within the said island, have been and are accustomed to be repaired; and that, from and after the said 11th day of October such particular parishes, tithings, divisions, and townships, shall be discharged from the exclusive burden of keeping and maintaining such bridges, drains, and sewers in repair."

Sect. 81 enables the commissioners to build, erect, repair, and keep in repair any bridge or bridges, arch or arches, upon any part or parts of the roads in the island, and across any river, stream, ditches, or drains therein or contiguous thereto, making recompense to the owners or occupiers of lands for damage done to them. Sects. 53, 55, 62, empower the commissioners to assess the inhabitants for the repairs of the highways.

In 1838, 1839, and 1840 the justices of the Isle of Wight division

(a) Local and personal, public; "For amending the roads and highways in the Isle of Wight."

repaired Black Bridge out of the island rate so made by order of Quarter Sessions as aforesaid. In 1840 it was wholly rebuilt by them out of the island rate, with stone, with one arch. The old bridge was narrower by three or four feet, and consisted of stone walls at each end, with oak timber trees placed from one wall to the other across the stream. *846] Across the trees *were planks, upon which gravel was placed, and the road over the bridge formed. This old bridge was repaired about forty years ago, just before the passing of the local Act above mentioned, when new timbers and planks were substituted in place of the old ones, which were decayed; but the walls were not then disturbed. This work was done at the expense of the tithing of Knighton. The side fences to the bridge then consisted of posts and rails. The wall portion at each end was left standing until the rebuilding in 1840. The justices of the island built this new bridge in 1840 without observing any of the forms required by stat. 43 G. 3, c. 59.(a)

In 1842 the county again proposed to assess the Isle of Wight in common with the rest of the county, according to a fresh valuation made under stat. 55 G. 3, c. 51,(b) and stat. 56 G. 3, c. 49,(c) and without reference to the old proportions: and, in consequence of the opinions of counsel then given, such assessment was made, and has since continued, and has been from time to time paid; and the Isle of Wight has ever since been included in the general assessment; and no separate *847] island *rate has been made at the Quarter Sessions: but applications have been made, from time to time, to the justices of the general Quarter Sessions at Winchester, to repair bridges and bridewells in the Isle of Wight when the repairs became necessary.

In January, 1847, Black Bridge was repaired by the county magistrates, when the sum expended was 2*l.* 15*s.*; and a like repair has been once made by the same magistrates, but, on this last occasion, without prejudice to the question of liability. The commissioners of highways under the above-mentioned local Act have repaired the road over the bridge, and for one hundred yards on either side thereof, since the passing of the local Act down to 1842.

(a) "For remedying certain defects in the laws relative to the building and repairing of county bridges," &c.

Sect. 5 enacts: "That no bridge hereafter to be erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled;" "and which surveyor, or person so appointed, is hereby required to superintend and inspect the erection of such bridge, when thereunto requested by the party or parties desirous of erecting the same." Sect. 7 declares that the Act is not to extend to bridges maintained or repaired by reason of tenure or prescription.

(b) To amend an Act (12 G. 2, c. 29) "for the more easy assessing, collecting, and levying of county rates."

(c) Explaining and amending stat. 55 G. 3, c. 51.

The case was argued in last Easter term.(a)

Crowder, for the prosecution.—The county is liable to repair this bridge. All bridges of this kind must, since stat. 53 Geo. 3, c. xcii., s. 67, be repaired in the same way as those usually called county bridges; that is, since 1842, at the expense of the county. The defendants, in order to rebut this liability, must show a distinct liability on the part of some one else. [Lord CAMPBELL, C. J.—It seems an unreasonable construction of the Act to hold that it imposed upon the county the repair of these bridges. Did it not merely include them among the bridges for the repair of which a separate island rate was made?] The separate island rate was made under an arrangement between the county and the island, and did not destroy the common law liability of the county to repair within the *island: the island repaired for the county, in [*848 consideration of being exempted from payment to the county bridge rate and to the county house of correction. Since 1842 this arrangement has been discontinued, and the county repairs all county bridges within the island. Therefore, under sect. 67, this bridge, being one which was formerly repaired by the tithing, must now be repaired by the county. It will be contended that this is not a county bridge, within stat. 43 Geo. 3, c. 59, s. 5, inasmuch as it was not rebuilt under the directions of the county surveyor. But it is not a new bridge within the meaning of that Act; it is substantially the same; *Rex v. Devon*, 5 B. & Ad. 383 (E. C. L. R. vol. 27); and therefore sect. 5 does not apply.

Kinglake, Serjt., for the defendants.—The county is not liable. Before stat. 53 G. 3, c. xcii., all bridges in the island were repaired in one of three ways, viz., *ratione tenuræ*; by the tithings or parishes; or by rates in the nature of county rates, made under the arrangement of 1774. In no case were they repaired by the county. [Lord CAMPBELL, C. J.—The county did not repair in fact; but it may nevertheless have been liable to repair in some cases.] The practice, under the arrangement of 1774, was to make a separate rate, apart from the county rate, for the repair of the county bridges in the island; and the island was exempted from the county rate for the repair of bridges in the county, evidently in consideration of its liability to repair its own bridges. [Lord CAMPBELL, C. J.—But the rate was in the nature of a county rate; and was made by the justices for the county.] At all events this particular bridge was one of those originally repaired by the tithing. Then stat. 53 G. 3, c. xcii., does not throw the repair of bridges of this class *upon the county; but, recognising the arrangement of 1774, provides that they shall be repaired in the same [*849 way as those island bridges usually called county bridges; that is, by a separate island rate. Sects. 53, 55, 62, give the Commissioners under

(a) Saturday, May 1st. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js. The other cases were argued on the same day before the same Judges.

the Act power to make assessments upon the inhabitants of the island for the repair of the highways; which tends to show that it could not have been the intention of the Act to cast the repair of the bridges in the island upon the county at large.

Secondly, stat. 43 G. 3, c. 59, applies here. The present bridge is clearly a new bridge; the case states that it has been entirely rebuilt; and it was rebuilt, not for the purpose of repair, but of substitution. *Rex v. Devon* is not in point; there the bridge had been carried away by a flood, and the county was liable to replace it.

Crowder, in reply.—The island was liable to repair the county bridges in the island only as long as the agreement of 1774 was acted upon; and, even during that period, such liability did not arise by law. The practice under the agreement has been discontinued; the county, therefore, is now liable to repair all the county bridges in the island. Sects. 53, 55, 62, cannot control the express provisions of sect. 67.

Cur. adv. vult.

SANDOWN BRIDGE.

The case, in addition to the facts stated in the preceding case as to the practice, before and after stat. 53 G. 3, c. xcii., with respect to the repair of bridges *within the island, and the mode of rating, set *850] out the following facts with respect to the particular bridge.

The bridge mentioned in the indictment is a stone and brick bridge, used by the public, and erected since 1813, under the circumstances hereinafter mentioned, instead of an ancient public bridge of stone, called by the same name, situate in the tithing of Sandown, in the parish of Brading, across the same stream of water; which bridge always, before and at the passing of the local Act, 53 G. 3, c. xcii., had been used to be repaired by the tithing of Sandown.

The present bridge was built in 1814, since the passing of the local Act above mentioned. The old one was of stone, and narrow dimensions, sufficient only for one carriage or wagon to pass at a time; and stood in a different position, rather lower down the stream. This bridge had two arches, and was generally used for carriages only when there was a great depth of water. At other times carriages used to pass through the stream. This bridge being out of repair, the justices for the island division caused the present new bridge to be built, of stone and brick, of greater width than the old one, and sufficient to enable two carriages to pass each other. It consists of one arch only; and the road has been raised at each end, so that all carriages now regularly pass over at all times. The expense of the new bridge was defrayed out of a local rate ordered by the Quarter Sessions of the county in the manner hereinbefore described, and levied on the inhabitants of the island. In the erection of the bridge the justices of the island division employed a local surveyor, but did not comply with any directions of stat. 43 G. 3, c. 59. Before 1842 the new bridge

repaired, *by order of the justices of the island division, from the local rate ordered and levied as aforesaid. In 1849 it was [*851 repaired by an order of Quarter Sessions, but without prejudice to the question of liability. The Commissioners of Highways under the above named local Act have always repaired the road over the bridge and one hundred yards at each end, down to the year 1842.

Crowder, for the prosecution.—It will be contended, in addition to the general question as to the liability to repair, that this bridge, having been built higher up the stream than the old bridge for which it was substituted, is a new bridge within the meaning of stat. 43 G. 3, c. 59, and that the provisions of that statute have not been complied with. But it was built by the order of the justices for the island division, acting for the county at large; and the expense was defrayed out of the island rates. Stat. 43 G. 3, c. 59, s. 5, does not, therefore, apply, inasmuch as the bridge has not been built “by or at the expense of any individual or private person or persons.”

Kinglake, Serjt., for the defendants.—The justices for the island division, as such, had no authority to order the bridge to be rebuilt. [ERLE, J.—May they not act as a committee appointed by the Quarter Sessions?] That does not appear to have been the fact. If they act as justices for the division only, they must be considered as private persons within the statute. In *Rex v. Derby*, 3 B. & Ad. 147 (E. C. L. R. vol. 27), trustees under a local turnpike Act were held to be private persons within sect. 5. The building of this bridge is, practically, the same thing as the widening *of the old bridge; and, if that is [*852 done on behalf and at the expense of the island, the island is bound to repair, if it was liable to repair the old bridge, according to the principle laid down in *Regina v. Adderbury East*, 5 Q. B. 187 (E. C. L. R. vol. 48). This question was discussed in *Rex v. West Riding of Yorkshire*, 5 Burr. 2594. [WIGHTMAN, J.—If the old bridge had been a county bridge in the island, instead of a bridge repaired by the tithing, who would be liable to repair the new bridge?] It would be difficult to say, if it had been built by order of the justices for the island division. Probably the island would be liable, under stat. 22 H. 8, c. 5.(a) [Lord CAMPBELL, C. J.—How would the rate be raised in that case?] Perhaps one general rate would be necessary, under stat. 12 G. 2, c. 29.(b)

Crowder replied.

Cur. adv. vult.

TINKER'S BRIDGE.

The case, in addition to the details as to the repairing of bridges in the island, and the practice as to rating in respect of such repairs, stated that Tinker's Bridge is an ancient foot bridge in the parish of Shorwell, formed by three planks and a handrail, over a small stream running

(a) “For bridges and highways.”

(b) “For the more easy assessing, collecting, and levying of county rates.”

liability in others, we are of opinion that there should in this case be judgment for the Crown.

There were two other cases against the county, for non-repair of two other bridges in the island, Sandown Bridge and Tinker's Bridge. The case of Sandown Bridge turned upon the same question as that upon which we have just expressed our opinion. Some minor points were made in it, which were in effect disposed of during the argument; and our judgment, therefore, in this case, as well as in that of Black Bridge, will be for the Crown.

In the case of Tinker's Bridge, we were of opinion at the time of the argument, and are still, upon the facts stated in the case with reference to that bridge, that it was not such a bridge as the county would be bound to repair as a county bridge; and in that case our judgment is for the defendants.

Verdicts for the Crown on the first two indictments to stand.

Verdict to be entered for the defendants on the third.

***857] *MARDALL v. THELLUSSON and Others, Executors of WILLIAM THEOBALD, Deceased.(a) June 18.**

An executor sued, as such, for a debt which accrued to the plaintiff from the testator in his lifetime, may set off a debt for money had and received to defendant's use, as executor, and money due on an account stated with him as executor, since the death of the testator; such debts being mutual, within stat. 2 G. 2, c. 22, s. 13.

ASSUMPSIT. The first three counts stated that the testator William Theobald, in his lifetime, was indebted to the plaintiff for work and labour, money paid, and money due on an account stated, respectively; averring promises by testator in his lifetime. The fourth count set out a special contract between plaintiff and testator, and breach thereof by the latter. The fifth count was for money due from defendants, as executors, on an account stated between plaintiff and defendants, as executors, averring a promise by defendants as such executors.

Third plea: To the first, second, third, and fifth counts, a set-off for money had and received by plaintiff to the use of defendants, as executors as aforesaid, and for money due from plaintiff to defendants as executors, on an account stated between them.

Replication, to third plea, traversing the set-off. **Issue thereon.**

There were other issues in fact.

On the trial before Lord Campbell, C. J., at the Middlesex Sittings after last Hilary Term, a verdict was given for the plaintiff on all the

issues except that on the third plea, and for the defendants upon the issue on the third plea. *Shee*, Serjt., in Easter Term following, *obtained a rule nisi for judgment non obstante veredicto on [*858 that issue. (a) In last Trinity Term, (b)

Channell, Serjt., and *C. W. Wood*, showed cause.—First, to entitle the plaintiff to judgment non obstante veredicto, it must be shown, not only that the plea is bad in law, but that it is bad for confessing the cause of action without avoiding it. In fact, judgment non obstante veredicto is called “judgment as upon confession” in some of the treatises on pleading; *Stephen on Pleading*, p. 108, (5th ed.) But here the plea is not in confession and avoidance. [Lord CAMPBELL, C. J.—I should have thought that a plea of set-off was peculiarly a plea in confession and avoidance.] The real gist of the plea is a denial that the defendant is indebted, the reason given being that there is a cross debt due from the plaintiff. Next, the plea is good in itself. The objection is, that the defendants are not entitled to set off a debt due from the plaintiff to them as executors against a debt due to the plaintiff from the testator in his lifetime; that the set-off is so pleaded, being pleaded to all the common counts; and that, being bad as to part, it does not answer all the cause of action to which it is pleaded. But a debt of this kind may be set off where the executor sues in the character of executor, though not if he sues in his own name. That was the distinction taken in *Shipman v. Thompson*, Willes, 108; and it *is noticed in 2 *Williams on Executors*, p. 1596 (4th ed.). [*859 [Lord CAMPBELL, C. J.—The language of stat. 2 G. 2, c. 22, s. 13, is that, “if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other.” Here the debts set off against each other are not mutual; one is between the testator and the plaintiff, the other between the testator’s executors, as such, and the plaintiff.] The debt between the testator’s executors, as such, and the plaintiff is, substantially, a debt between the testator and the plaintiff; it is claimed as part of his estate, and is clearly a debt within the contemplation of the statute. In *Blakesley v. Smallwood*, 8 Q. B. 538 (E. C. L. R. vol. 55), it was held that in an action against an executor, on an account stated by him as such, the defendant might set off a debt due from the plaintiff to the testator in his lifetime. That was the converse of the present case. [CROMPTON, J.—There is this distinction, as regards a set-off, between an action by, and an action against, an executor: that in the first case the assets might be affected, if the defendant set off a debt due from the testator to him: in the second case the assets would not be affected.]

(a) *Hamfrey* obtained a cross rule to enter a verdict for the defendants upon the fourth count, on a question as to the effect of the evidence: on cause being shown, the rule was made absolute. It was not thought necessary to report the argument on this point.

(b) 2d. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, J.

Ogle, contra.—The defendants can rely only on stat. 2 Geo. 2, c. 22; and the debt pleaded here by way of set-off is not a mutual debt within that statute. The defendants might have sued the plaintiff for the debt in question, but cannot set it off in an action against them to recover a debt due from the testator. Sect. 13 of stat. 2 Geo. 2, c. 22, *860] applies only to cross debts in the *same right. The distinction taken as to *Shipman v. Thompson* is immaterial. That case and *Tegetmeyer v. Lumley*(a) are in point for the plaintiff.

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

Upon a rule for judgment non obstante veredicto, the question is raised, whether a debt due to the defendants, as executors, for money had and received after the death of the testator can be set off against a debt due from the defendants, as executors, having become due from the testator before his death. Stat. 2 G. 2, c. 22, gives the right of set-off where there are mutual debts between the plaintiff and the defendant: and the debts above mentioned are comprised in these words, they being mutual and due in the same right between the plaintiff and defendant. Although the second clause, authorizing, in the case of a suit by or against an executor, the set-off of a debt due from the testator, does not apply, we think that clause was not intended to restrict the operation of that which preceded.

This construction was adopted in *Blakesley v. Smallwood*; and a set-off of a debt from the plaintiff to the testator was allowed against a count upon an account stated by the executor with the plaintiff. Against this view the plaintiff contended that such a set-off had been held illegal in *Shipman v. Thompson* and the cases referred to in *Willes*, 264, in notis.

*861] But, upon examination, these authorities do not *appear to support the position contended for. In *Shipman v. Thompson* the plaintiff sued for money due to the testator, received by the defendant after his death, and the defendant attempted to set off a debt from the testator before his death; so that the question appears the same, the parties being reversed. But the plaintiff in that case sued in his own right, and not as executor: this he had the option of doing in respect of money received after the death; and, as he was suing in his own right, a debt due from the testator was not a mutual debt within either clause of the statute. In respect of such a debt the executor may sue in either capacity; and, by suing in his own right, and so preventing the set-off, he prevents a creditor from interfering with the distribution of assets; while, on the other hand, if, when sued as executor for a debt due before the death, he is allowed to treat a debt accruing after the death as due to him as executor, the same mischief is prevented. A plaintiff, while wrongfully withholding assets

(a) Note (a) to *Hutchinson v. ...*, *Willes*, 264.

equal to the debt he claims, ought not to be allowed to take from the assets a further amount in payment of that debt, and force the executor to the risk and waste of another action for the assets so wrongfully withheld, instead of making a set-off in the first action.

Rule discharged.(a)

(a) See p. 357, note (a).

In general, the decisions upon the English statutes of set-off are respected in this country as guides in the construction of our own Acts of Assembly, though in some of the states the latter are more comprehensive than the former: *Gordon v. Bowne*, 2 Johnson, 150; *Ellmaker v. The Franklin Fire Ins. Co.*, 6 Watts & Serg. 444. Set-off exists however only when it is authorized by statute: *Ulrich v. Berger*, 4 Watts & Serg. 19. In accordance with the decision in the text, are *Anthony v. Miller*, 1 Georgia, 30; *Galloway's Appeal*, 6 Barr, 37. A set-off cannot be admitted in a suit brought by or against executors or administrators, where it disturbs the due course of distribution of the assets: *Murray v. Williamson*, 3 Binney, 135; *Bosler v. Exchange Bank*, 4 Barr, 34.

*MACKENZIE v. The SLIGO and SHANNON Railway Company. June 18. [*862]

The Joint Stock Companies Winding-up Amendment Act, 1849 (12 & 13 Vict. c. 108), excepts, by sect. 1, from the application of the Joint Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45), railway companies incorporated by Act of Parliament. The Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 30, enacts that, notwithstanding such provision, the two first-mentioned Acts shall apply to any such incorporated railway company in respect of which an order for winding it up may have been made before the passing of The Joint Stock Companies Winding-up Amendment Act, 1849, and that the proceedings for winding-up the same shall be carried on under the Winding-up Acts of 1848 and 1849, or either of them. Per Lord Campbell, C. J.: stat. 13 & 14 Vict. c. 83, is retrospective, and renders valid proceedings taken, before the passing of this Act, for the dissolution of a railway company incorporated by statute.

The omission by a creditor of a railway company to prove his debt before the Master, under The Joint-Stock Companies Winding-up Act, 1848, sect. 73, cannot be pleaded in bar to an action against the Company by such creditor. The proper mode of stopping the action is to apply, under that section, for a Judge's order to stay proceedings until proof be made.

ASSUMPSIT on an award, by which defendants were ordered to pay to plaintiff a certain sum of money. Breach, Non-payment. There was also a count on an account stated. The writ was issued on 8th March, 1850.

Fourth plea: That defendants, to wit, on, &c., and thence and until the making of the order absolute for dissolution thereafter mentioned, were a trading or commercial company, viz. a railway company, incorporated by The Sligo and Shannon Railway Act, 1846; and that, after 14th August, 1848, and before the making of the said order absolute, a petition was presented to the Court of Chancery by four of the directors and shareholders of the Company, alleging that an action at law had been commenced, and was then pending, by the plaintiff against the

Company, that there was no probability of the railway being completed, and that the Company had ceased to carry on business, and was wholly insolvent and unable to meet its engagements, and praying that the Company might be dissolved and wound up under the provisions of The Joint Stock Companies Winding-up Act, 1848; that the said Court *863] considered that it was just and equitable that the said Company should be so dissolved and wound up; and that the said petition was afterwards, and before the making of the said order, to wit, 27th April, 1849, advertised in the London Gazette, and was, with a copy of the said Gazette, served at the office of the Company, upon the secretary: and that afterwards, and before 1st August, 1849, and before the commencement of this suit, to wit, on, &c., by an order of the Court of Chancery, it was ordered that the Company should be dissolved and wound up under the provisions of the said Joint Stock Companies Winding-up Act, and that it should be referred to the Master to wind up the affairs of the Company; and that, by reason of the premises, the Company became and was, from the date of the said last-mentioned order, absolutely and wholly dissolved. Verification.

The fifth plea contained the same allegations as the fourth plea: and alleged, in addition, that, after the making of the said order absolute, to wit, on 24th May, 1849, the said order absolute was carried in before the said Master, and that, by his direction, advertisements were published in two successive numbers of the London Gazette, and in three other newspapers, by which notice was given that the said Master would, at a day, hour, and place therein mentioned, being a day within fourteen days from the day of publication of the first of the said advertisements, to wit, on, &c., appoint an official manager of the said Company under the said Joint Stock Companies Winding-up Act; and that afterwards, and within fourteen days from the day of publication of the first of the said advertisements, and before the commencement of this suit, the *864] said Master appointed one *J. E. C. official manager of the said Company, who then accepted the said appointment, and became and was, and still is, the official manager of the said Company: and that since the appointment of the said official manager no permission whatever had been given by the said Master to the plaintiff to commence or proceed with the present action, or any action whatever, against the defendants, or against any other person representing the said Company; and that no proof of the plaintiff's debt had at any time been made before the said Master or otherwise. Verification.

General demurrer to both pleas. Joinder.

The cause was argued last Term.(a)

Raymond, for the plaintiff.—The fourth plea is bad. First, The Joint Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45),
ies incorporated by Act of Parliament.

—bell, C. J., Coleridge and Erie, Ja.

Sect. 1, which declares to what companies the Act is to apply, (a) *certainly does not include railway companies of that description; and sect. 1 of The Joint Stock Companies Winding-up Amendment Act, 1849 (12 & 13 Vict. c. 108), which amends and explains The Joint Stock Companies Winding-up Act, 1848, and which, by sect. 38, is to be taken as part of that statute, expressly excepts from the application of the Act of 1848, "railway companies incorporated by Act of Parliament." At all events, therefore, any proceedings taken under that Act in the present case since 1st August, 1849, the date of the passing of stat. 12 & 13 Vict. c. 108, would be invalid. [Lord CAMPBELL, C. J.—The order in Chancery was made before that date.] The defendants rely on stat. 13 & 14 Vict. c. 83, s. 80, which provides that, notwithstanding the provision of The Joint Stock Companies Winding-up Amendment Act, 1849, that Act and the Winding-up Act of 1848 shall apply "to any railway company incorporated by Act of Parliament in respect of which an order may have been made by the Court of Chancery for winding up the affairs of such company previous to the passing of the said Joint Stock Companies Winding-up Amendment Act, 1849, and the proceedings for winding up the same shall proceed and be carried on under the said" Acts "or either of them." But that provision is only prospective, and renders valid only those proceedings, under the Acts in question, against a railway company incorporated by Act of Parliament, which have been taken since 14th August, 1850, the date of the passing of stat. 13 & 14 Vict. c. 83. It could not have been intended to apply to proceedings taken under The Joint Stock Companies Winding-up Amendment Act, 1849. *[Lord CAMPBELL, C. J.—But the order for dissolution was made under The Joint Stock Companies Winding-up Act, 1848.] [*866 By sect. 38 of the Act of 1849, that Act is to be taken as part of the Act of 1848; so that, if stat. 13 & 14 Vict. c. 83 does not apply to proceedings taken under one, it does not apply to proceedings taken under the other.

Next, even if The Joint Stock Companies Winding-up Act, 1848, does apply to a company of this description, the plea is bad for not showing any discharge of the defendants' debt. It alleges merely that the Company was dissolved under the order in Chancery; but that, of

(a) Sect. 1 declares, among other things, that the Act shall apply to all companies corporate or unincorporate within the provisions of stats. 7 & 8 Vict. c. 111, and 8 & 9 Vict. c. 98 (including all companies existing on 1st November, 1844, and which shall have obtained or shall obtain a certificate of registration under stat. 7 & 8 Vict. c. 110), and to all companies which would have been within the provisions of either of stats. 7 & 8 Vict. c. 111, and 8 & 9 Vict. c. 98, if they had not been dissolved or had not ceased to trade at the time of the passing thereof respectively, and to all banking companies which would have been within the provisions thereof if they had not been specially excepted from the provisions of stat. 7 & 8 Vict. c. 110, and to all companies which, under the provisions of stat. 9 & 10 Vict. c. 28, shall before 1st March, 1848, have become bankrupt, and to all companies, associations, and partnerships, to be formed after the passing of the Act, whereof the capital or the profits is or are divided or to be divided into shares, and to all companies, associations, and partnerships, to be formed after the passing of the Act, whereof the capital or the profits is or are divided or to be divided into shares transferable without the express consent of all the copartners.

itself, would not discharge the Company from their liability to be sued. This is shown by sects. 50, 52, 53, which provide for the form in which companies are to sue or be sued after the appointment of an official manager, which takes place after the order for dissolution. And sect. 58 expressly declares that no petition or order, under the Act, for the dissolution or winding up of any company shall in anywise alter or affect the rights or remedies of creditors, or any contracts or engagements entered into by or with the company. Reliance will be placed on sect. 16, which declares that, "from the date of any order absolute for dissolution, or from any date to be therein fixed for that purpose, the Company therein specified shall be absolutely dissolved." But that means, as sects. 50, 52, 53, 58 show, absolutely dissolved as regards future transactions, not as regards contracts or engagements previously entered into, or the remedies for the breach of them.

Then, as to the fifth plea. That is framed upon sect. 73 of the Joint *867] Stock Companies Winding-up Act, *1848. Now that section does not absolutely bar the action, but only provides for a suspension of proceedings until proof is made of the claim. But the Act did not, at the time when the action was commenced, which was after the passing of The Joint Stock Companies Winding-up Amendment Act, 1849, and before the passing of stat. 13 and 14 Vict. c. 83, apply to railway companies incorporated by Act of Parliament. The plaintiff, therefore, could not have proved his claim before the Master. It is true that stat. 13 & 14 Vict. c. 83, s. 30, brings railway companies incorporated by Act of Parliament within the operation of the Joint Stock Companies Winding-up Acts, 1848 and 1849; but that does not, retrospectively, deprive the plaintiff of the right which he previously had at common law of suing the Company. In *Hitchcock v. Way*, 6 A. & E. 943, it was laid down that, where the law is altered by statute, pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, shows a clear intention to vary the mutual rights. *Edwards v. Sherren*, 11 M. & W. 595,† *Moon v. Durden*, 2 Exch. 22,† and *Marsh v. Higgins*, 9 Com. B. 551 (E. C. L. R. vol. 67), were decided upon the same principle. [Lord CAMPBELL, C. J.—Stat. 13 & 14 Vict. c. 83, is clearly retrospective, both in its object and in its terms.]

Wordsworth, *contra*.—In *Ex parte Barber*, 1 Macn. & G. 176, it was held that a railway company, provisionally registered, and which had become abortive, was within the provisions of stat. 7 & 8 Vict. c. 111. *868] and therefore within those of The Joint Stock Companies Winding-up Act, 1848, by sect. 1 of the latter statute. [Lord CAMPBELL, C. J.—We need not discuss the original effect of that Act, if proceedings taken under it against railway companies incorporated by Act of Parliament have been retrospectively made valid by stat. 13 & 14 Vict. c. 83.]

Then, as to the fifth plea. It is not contended that the plaintiff's right of action is barred, but that he cannot sue without proving his claim before the Master. The defence is in accordance with the decisions in *Macgregor v. Keily*, 4 Exch. 801,† *Thompson v. Universal Salvage Company*, 3 Exch. 310,† cited there, and *Prescott v. Hadow*, 5 Exch. 726.†

Raymond, in reply.—Sect. 73 of the Joint Stock Companies Winding-up Act, 1848, provides a specific mode of putting a stop to the action, by application to a judge for an order to stay proceedings until proof of the claim. The defendants are not at liberty to plead the omission to prove by way of bar. *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

In this case, upon a demurrer to the fourth plea in bar of the action, the question has been raised, Whether the dissolution of the Company under The Joint Stock Companies Winding-up Act, 11 & 12 Vict. c. 45, was a bar to the action: and, upon the demurrer to the fifth plea, the question is raised, under sect. 73 of the same Act, Whether the omission to prove the claim *before the Master was a bar. [*869 We are of opinion that there ought to be judgment for the plaintiff on these demurrers, the pleas being bad. There is no provision in the statute taking away the common law remedies for a debt upon a dissolution under the statute: on the contrary, by sect. 58, it is enacted that nothing in the Act shall alter or affect the rights or remedies of creditors. And, with respect to prohibiting any action after an order for dissolution until proof before the Master, under sect. 73, it is clear that no bar to the action is created, but a suspension until proof made or exhibited, after which the creditor is at liberty to proceed with the action, as was decided in *Prescott v. Hadow*, 5 Exch. 726.† As the 73d section provides an appropriate remedy for suspension of the action until after proof, by application for an order to stay proceedings, full effect is given to all parts of the section by holding that the action may be stayed, by judge's order, until after proof, but is not barred altogether. Judgment for plaintiff.

*BATEMAN v. BLUCK. June 18.

[*870

Trespass for entering plaintiff's close and pulling down a wall therein. Plea: That the close was a public pavement within the Metropolitan Paving Act, 57 G. 3, c. xxix.; that plaintiff, unlawfully and contrary to the Act, erected thereon the said wall; and, because the wall encumbered the pavement, and plaintiff refused, on defendant's request, to remove the same, defendant entered and pulled it down.

Held, on motion for judgment Non obstante veredicto, that the plea was bad for not showing that it was absolutely necessary for defendant, in order to exercise the alleged right of passage, to pull down the wall.

A highway may, in law, exist over a place which is not a thoroughfare. Whether, in fact, it or not, is a question for the jury.

TRESPASS for breaking and entering the close of plaintiff, in the parish of St. Sepulchre, in the county of Middlesex, and pulling down a wall of plaintiff in the said close.

First plea : Not guilty. Issue thereon.

Second plea : That the said close and the said wall were not, nor was either of them, the close or wall of the plaintiff. Issue thereon.

Third plea : That the said parish of St. Sepulchre, before and at the time of the passing of stat. 57 G. 3, c. xxix., (a) was a part of the metropolis included within the weekly bills of mortality; and the said close was, before and at the time when, &c., a paved public place within the true intent and meaning and subject to the provisions of the said Act, that is to say, a public footway pavement which had been and then was paved, cleansed, and lighted under the authority of the commissioners acting under stat. 12 G. 3, c. 68; (b) *and that the said *871] close was not at the said time when, &c., nor was any part thereof, a turnpike road or any part of any turnpike road; and that, just before the said time when, &c., the plaintiff had, contrary to the provisions of the first-mentioned Act, unlawfully laid in and upon the said public footway pavement divers bricks, &c., and had therewith formed and constructed in and upon the said pavement the said wall in the declaration mentioned; and, because, at the said time when, &c., the said wall remained on and encumbering the said public pavement, and because the plaintiff then, upon the reasonable request of the defendant, refused to remove the same, the defendant, at the said time when, &c., entered upon the said close for the purpose of pulling down the said wall, and removed the bricks and other materials to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage: which are the same alleged trespasses, &c.

Replication : That the said close was not, at the time when, &c., a paved public place within the true intent and meaning and subject to the provisions of the said first-mentioned Act. Issue thereon.

Fourth plea : That, before and at the said time when, &c., there was and of right ought to have been, into, through, over, and along the said close, a public and common highway for all the Queen's subjects to go and return, pass and repass, on foot, at all times, at their own will and pleasure; that defendant, before, and at the said time when, &c., was possessed of a dwelling-house abutting on and having a door opening into the said highway; and, because the plaintiff had wrongfully erected

(a) Local and personal, public. "For better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein." (Printed in the Statutes at Large.)

(b) "For the better relief and employment of the poor within that part of the parish of St. Sepulchre, which is in the county of Middlesex; and for paving, cleansing, lighting, watching, and regulating the squares, streets," &c., "within the same; and for removing annoyances therefrom," &c.

*in and upon the said highway the said wall so near to the said door of the defendant as to obstruct the same, so that defendant [*872 could not, without prostrating the said wall, pass along the said highway into and from the said house, and because plaintiff, at the time when, &c., refused, upon reasonable request of defendant then made to him in that behalf, to remove the said wall, defendant, at the said time when, &c., entered upon the said close for the purpose of pulling down, and did pull down, the said wall, &c. (justifying as in the third plea).

Replication: That there was not, nor of right ought to have been, into, through, over, and along the said close, a public and common highway, &c., as in the plea alleged. Issue thereon.

On the trial before Coleridge, J., at the Middlesex Sittings after last Easter Term, it appeared that the alleged close was a court opening into a public street in the parish of St. Sepulchre. There was no thoroughfare through the court. It contained fourteen or fifteen houses. The defendant was tenant of one of these houses, which had a door opening into the court, made by a previous tenant. The defendant had been required by the plaintiff to block up the door, which he refused to do; whereupon the plaintiff erected the wall in question and thereby blocked up the door; upon which the defendant pulled the wall down. The wall was erected on the pavement of the court; and the court had been paved, at the request of the plaintiff, by the Commissioners under stat. 12 Geo. 3, c. 68, and was lighted under the powers of the same Act. It was objected, for the plaintiff, that the third and fourth pleas were not proved, inasmuch as the court *was not a public place within the meaning of stat. 57 G. 3, c. xxix., and, not being a thorough- [*873 fare, could have no highway through it. The learned Judge directed a verdict for the plaintiff on the first issue and on so much of the second issue as related to the wall, and for the defendant on the residue of the second issue, and on the third and fourth issues, with leave to move to enter the verdict for the plaintiff on the third and fourth issues.

Knowles, in last Easter Term, obtained a rule *Nisi* according to the leave reserved, and also to enter judgment for the plaintiff *Non obstante veredicto* on the third issue.

Montague Chambers and *Lush* now showed cause. (a)—First, as to the fourth plea. The close in question is a highway. It is objected that there is no thoroughfare through it: but in *The Trustees of The Rugby Charity v. Merryweather*, (b) Lord Kenyon observed that a thoroughfare was not necessary to make a place a highway. *Woodyer v. Hadden*, 5

(a) The argument commenced on June 10th, before Lord Campbell, C. J., Coleridge, Erie, and Crompton, Js.

(b) Note (a) to *Daniel v. North*, 11 East, 375. See *Rex v. The Marquis of Downshire*, 4 A. & E. 608 (L. R. vol. 31).

Taunt. 125 (E. C. L. R. vol. 1), will probably be relied on: but the decision there did not turn upon this particular point, with respect to which Chambre, J., in giving judgment, remarked that the decision in *The Trustees of The Rugby Charity v. Merryweather*, had been generally acquiesced in. [Lord CAMPBELL, C. J.—Unless the place be used as a public passage, what use can the public make of it?] That difficulty was suggested by *Abbott, C. J., in *Wood v. Veal*, 5 *874] B. & Ald. 454 (E. C. L. R. vol. 7), which will probably be cited on the other side; but the point was not expressly decided there. In the present case the public might have acquired the right to go round the court when passing between two points situate on either side of it.

Next, as to the third plea. The question whether the locus in quo was a public footway pavement is substantially the same as that which arises on the fourth plea. But, further, it is contended that the plaintiff is entitled to judgment *Non obstante veredicto*, because a private person has no right to abate an obstruction in a public highway, unless it interferes with his passage along such highway. *Dimes v. Petley*, 15 Q. B. 276 (E. C. L. R. vol. 69), will be relied on. But in that case, which was an action for negligence in navigating defendant's vessel, whereby plaintiff's jetty was injured, the defence set up, that the jetty was an unlawful obstruction in the river, and that the defendant having occasion to navigate his vessel over that part of the river, and using all the skill that would have been necessary if the jetty had not been there, struck against it, was held bad, because it did not show that there was a necessity for the defendant to navigate his ship over that part of the river. But here the wall in front of the defendant's door must clearly be an obstruction, and must necessarily have been removed before the defendant could exercise his right of passage. [CROMPTON, J.—The plea does not allege such necessity.] The wall was an obstruction within sects. 65, 66, of stat. 57 Geo. 3, c. xxix. [Lord CAMPBELL, C. J.—Those sections impose a penalty upon the party creating the obstruction, and direct the removal of it by the appointed authorities; but the statute does not enable a private individual to take the law into his own *875] hands, *and remove the obstruction, unless it interfere directly and unavoidably with a right of his own.] That certainly makes it difficult to support the third plea.

Garth, contrà.—As to the fourth plea, there was no evidence that the court in question was a highway. It appeared that it was a *cul de sac*; and it could not be a highway unless it were a thoroughfare. [Lord CAMPBELL, C. J.—May not a square, or public promenade, having only one entrance, be a highway?] Perhaps so; but here there was no evidence to show that it was a public place. In *Hawkins's Pleas of the Crown*, Book I. c. 76, s. 1 (vol. II. p. 152, 7th ed.), it is said "that every way from town to town may be called a highway, because it is common to all the King's subjects, but that a way

church, or to the common fields of a town, or to a private house, or perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the King's subjects, but only to some particular persons, each of which, as it seems, may have an action on the case for a nuisance therein." The correctness of the decision in *The Trustees of the Rugby Charity v. Merryweather*, 11 East, 375, n. (a), was much questioned by Mansfield, C. J., in *Woodyer v. Hadden*, 5 Taunt. 125 (E. C. L. R. vol. 1). [Lord CAMPBELL, C. J.—In the latter case it was held that there was no dedication to the public.] Here there is still less evidence of any dedication. In *Wood v. Veal*, 5 B. & Ald. 454 (E. C. L. R. vol. 7), two of the Judges express their dissent from the doctrine laid down in *The Trustees of the Rugby Charity v. Merryweather*.

*Lord CAMPBELL, C. J.—I am of opinion that the verdict upon the issue on the third plea was properly given for the defendant, [*876 inasmuch as the evidence went to show that the locus in quo was a public place within the statute. But I am also of opinion that, upon this issue, the plaintiff is entitled to judgment *Non obstante veredicto*, inasmuch as the plea does not allege that the defendant enjoyed any right in the exercise of which it was necessary for him to remove the obstruction. He was bound, according to *Dimes v. Petley*, 15 Q. B. 276 (E. C. L. R. vol. 69), and the cases there referred to, to show, not only that he had such a right, but that there was no way in which he could exercise it without the removal. On the issue raised by the fourth plea, I think the defendant is entitled to a verdict. That plea alleges that there was a public highway through the locus in quo, and that it was impossible for the defendant to pass along the highway without removing the wall. The jury found that there was such public highway; and we are bound to assume that finding to be good, unless, as is contended, there cannot, in law, be a highway through a place which is no thoroughfare. It seems to me that such a doctrine is incorrect. There may or may not be a highway under these circumstances. Take the case of a large square with only one entrance, the owner of which has, for many years, permitted all persons to go into and round it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers. In *The Trustees of The Rugby Charity v. Merryweather*, Lord Kenyon laid down that there might be a highway through a place which was not a thoroughfare, and seems to have left it to the jury whether there was such highway or not. In *Woodyer v. Hadden*, 5 Taunt. 126 (E. C. L. R. vol. 1), the Court did not decide that there could not be a highway under such [*877 circumstances, but only that in that particular case there was none; and I do not find anything decided there which is necessarily inconsistent with what was laid down by Lord Kenyon. The fourth plea, therefore,

being proved, and being unexceptionable on the face of it, the defendant is entitled to our judgment.

COLERIDGE, J.—The third plea being given up, the question is, whether there was a highway through the locus in quo, as alleged in the fourth plea. It was proved that the court in question had one opening only into a public street; that it contained some fifteen houses, belonging to one person, but occupied by different tenants; that it was paved by the commissioners at the request of the plaintiff, and had always been lighted by the parish. The jury found that there was a public highway through it; and I am of opinion, as I was at the trial, that there was evidence for them, both of a dedication to, and of a user by, the public. The finding, therefore, upon the facts, is satisfactory. But it is objected that there cannot, in law, be a highway through a place which is not a thoroughfare, and that, therefore, I was not justified in telling the jury that there might be a highway through the court, and leaving it to them to say, upon the evidence, whether there was or not. I cannot see any such legal impossibility as has been suggested. It is suggested that the way through such a place as this must be assumed to be for the use of the inhabitants only; but surely it is for the jury to say whether there has or has not been a dedication and user. More or less user may be *878] proved *according to the size and character of the place; but the principle does not vary.

ERLE, J.—We are to say whether, in law, there can be a highway through a place which is not a thoroughfare. It seems to be clear, from the authorities, that there can; and I do not see any reason for holding that there should not. Whether, under the particular circumstances of each case, there is a thoroughfare, is a question for the jury.

CROMPTON, J., concurred.

Rule absolute for judgment Non obstante veredicto on the third issue. Rule to enter verdict for plaintiff discharged.

BISHOP, surviving Executor of EDWARD CURTIS, deceased, v.
EDWARD CURTIS. *June 18.*

Stat. 7 W. 4 & 1 Vict. c. 26, s. 3, empowering a testator to bequeath all personal estate which, if not bequeathed, would devolve upon his executor, does not enable a testator to bequeath a promissory note made to him, so as to pass the right to sue in respect of it. Such right is in the executor.

Where the legatee of such promissory note is convicted of felony, the forfeiture caused by such conviction does not divest the executor of his right to sue; though he is a trustee for the Crown in respect of the proceeds of the suit.

ASSUMPSIT. The first count was on a promissory note for 1000*l.*, made by the defendant in the lifetime of the testator payable to the testator on demand. Breach: Non-payment.

Plea (2) to first count. That, after the delivery of the said note to the testator, and before the commencement of this suit, to wit, on 14th June, 1848, the testator made and published his will, and thereby, amongst other things, bequeathed to his son, Charles Curtis, the said note; but the payment thereof the testator by his said will *directed [*879 not to be demanded or in any way made available till his said son should attain the age of twenty-one, and not then if his sons Edward and Charles should agree to enter into copartnership; but, if, on the contrary, a copartnership could not be agreed on, then the payment of the said note might be enforced, but without interest: that the testator appointed plaintiff and two others, one of whom was now deceased, his executors: that the testator died so possessed of the said note, without revoking or altering his said will as to the said bequest: that the plaintiff proved the said will and assented to the said bequest; whereupon and whereby the said Charles Curtis became entitled to the said note and to the money due thereon: that afterwards, and while the said C. Curtis was so entitled, and before the commencement of this suit, to wit, on, &c., the said C. Curtis was convicted of felony and sentenced to transportation for a term not yet expired; by reason of which said felony, and by force of the said judgment, the said C. Curtis forfeited to our Lady the Queen the said promissory note and the money due thereon and all causes of action in respect thereof. Verification.

Replication, suggesting the death of the remaining co-executor since the last pleading, and setting out the will of the testator verbatim, which contained the bequest as alleged in the plea. Verification.

Special demurrer. Joinder.

Maxwell, for the defendant.—The replication is no answer to the plea. The testator made his will after the passing of stat. 7 W. 4 & 1 Vict. c. 26, which provides, by sect. 8, that it shall be lawful for every person to bequeath all personal estate to which he shall be entitled *at the time of his death, and which, if not so disposed of, would [*880 devolve upon his executor or administrator. The note in question, therefore, passed to Charles Curtis under the will. [Lord CAMPBELL, C. J.—Stat. 7 W. 4 & 1 Vict. c. 26, does not give the power of bequeathing any other kinds of personalty than those which could be bequeathed before, although it gives additional powers as to realty.] Sect. 1 includes, in the definition of personal estate, debts and choses in action. Therefore the right of suing upon this note, which is a chose in action, and which, if not bequeathed, would vest in the executor, may now be bequeathed by will. [Lord CAMPBELL, C. J.—If so, the assent of the executor would not be necessary.] No doubt the legatee would take the bequest subject to the right of the executor to treat it as assets for the payment of the testator's debts. But here the plea alleges the assent of the executor. [CROMPTON, J.—His assent would - the property in the note to the legatee, but not the right to sue.]

That would depend on what it was the testator's intention to bequeath: he could, if he chose, bequeath not only the instrument itself, but the right of suing on it, under sects. 1, 3. [COLERIDGE, J.—Suppose the legatee here had not been convicted; how could he have sued?] He could have averred the bequest, and the assent of the executor. [Lord CAMPBELL, C. J.—The will declares that payment of the note is not to be enforced till a particular time; would the legatee have any legal right in the note before that time arrived?] At all events he would have a beneficial interest; and that would pass to the Crown by his conviction. In Hawkins's Pleas of the Crown, Book II. c. 49, s. 9 (vol. IV. p. 480, 7th ed.), it is said that "all things whatsoever which are *881] they be in action or possession, which the party hath, or is entitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture;" and one of the instances there given (sect. 10) is "a bond taken in another's name." The same doctrine is laid down in Bracton, as to outlawry, fol. 132 b, lib. III. c. 14, s. 12. In Bullock v. Dodds, 2 B. & Ald. 258, where these authorities are cited, it was held that to an action on a bill of exchange, endorsed to the plaintiff after his attainder, such attainder might be pleaded in bar. [CROMPTON, J.—If the legatee here had been the legal promisee, no doubt his right would have been forfeited.]

Hoggins, contra, was not called upon.

Lord CAMPBELL, C. J.—The plea is bad. It is admitted that before stat. 7 W. 4 & 1 Vict. c. 26, the property in this note, and the right to sue upon it, would not have vested in Charles Curtis, under the will; but it is contended that, under sect. 3 of that statute, they could be legally bequeathed. That is a misconstruction of the Act. The Legislature did not intend to make any kind of personalty bequeathable which was not bequeathable before, but only, as regards that kind of property, to regulate the form of executing wills. With respect to real estate, it does provide that some kinds not previously devisable, such as rights of entry, may be devised. But there is nothing to show an intention of enabling a testator to bequeath a chose in action, so as to pass *882] the right to sue. That right was certainly in the executor before the conviction of the legatee; and the conviction did not take it from the executor and give it to the Crown. The executor became a trustee for the Crown in respect of the proceeds; but his right to sue remained the same.

COLERIDGE, J.—I am of the same opinion as to both points. Stat. 7 W. 4 & 1 Vict. c. 26, was not intended to change an equitable interest in personalty into a legal interest. If the legatee here had sued upon the note, he must have sued in the name of the executor; and such right of suing did not pass to the Crown on his conviction.

ERLE, J., and CROMPTON, J., concurred.

Judgment for plaintiff.

MARSHALL and Another v. NICHOLLS. June 18.

By stat. 6 & 7 Vict. c. 79, s. 1, the articles of a convention between Her Majesty and the King of the French, for the guidance of the fishermen of the two countries in the seas between the British Islands and France, are to have the force of law. By articles 69, 70, 71, 75, all transgressions of the regulations, and all disputes between the fishermen, are to be submitted to the exclusive jurisdiction of, and settled by, the tribunal or magistrates designated by law; which tribunal may summarily impose penalties for such transgressions, and award compensation to parties injured. Sect. 11 of the Act declares such tribunal in England, to be any magistrate or justice of the peace having jurisdiction in the place in which, or in waters adjacent to which, the offence shall have been committed, or to which the offender shall be brought: and by sects. 11, 14, such magistrate may impose penalties, and award and enforce compensation to parties injured.

Held, that no action can be maintained for the breach of any article of the convention, or for damage caused by such breach, the remedy provided by the statute being exclusive.

CASE. The first count of the declaration stated that by a certain Act of Parliament (6 & 7 Vict. c. 79, "To carry into effect a convention between *Her Majesty and the King of the French concerning the fisheries in the seas between the British Islands and [883 France") trawl fishing is forbidden in all places where there are boats engaged in herring or mackerel drift net fishing; and it is enacted that trawl boats shall always keep at a distance of at least three miles from all boats fishing for herrings or mackerel with drift nets: And whereas, before and at the time, &c., and after the passing of the said Act, the plaintiffs were lawfully possessed of a certain boat, together with certain drift nets and other materials and implements for fishing for herrings, of the value of 200*l.*; and afterwards, to wit, on, &c., plaintiffs were, with their said boat, with the said nets, materials and implements, on the high seas, lawfully engaged in herring drift net fishing, which the defendant well knew, and whilst plaintiffs were in the said part of the high seas aforesaid, so engaged as aforesaid, defendant was then and there possessed of a certain other boat with materials and implements for trawl fishing: and plaintiffs say that, pursuant to and by virtue of the said Act, it became and was the duty of defendant to abstain from trawl fishing where plaintiffs in their said boat were engaged in herring drift net fishing; and it was, pursuant to and by virtue of the said Act, the duty of defendant, if defendant, in his said boat, commenced or engaged in trawl fishing, to keep, while so engaged, at a distance of three miles from the said boat or vessel of plaintiffs whilst plaintiffs were so engaged as aforesaid: Yet defendant, well knowing the premises, and disregarding his said duty, and contriving, &c., to injure plaintiffs in that behalf, whilst plaintiffs were so engaged as aforesaid, wrongfully and unjustly, and contrary to his said *duty, commenced and continued trawl fishing in the said place where [884 plaintiffs were so engaged as aforesaid; and defendant did not, whilst engaged in trawl fishing as aforesaid, keep at a distance of at least three miles from plaintiffs' said boat whilst plaintiffs, in their said boat,

were engaged in drift net fishing as aforesaid, but, on the contrary, then came so near to the plaintiffs' said boat that the trawl net of defendant came in contact and became entangled with the drift nets, materials, and implements of plaintiffs, whereby the said drift nets, materials, and implements of plaintiffs were very much broken, torn, &c., and plaintiffs have been put to a great expense, &c.

Plea (6) to the first count: That, at the said time when, &c., it was a time between sunset and sunrise, and that there were not, at the said time when, &c., hoisted, on any mast of the said boat of the plaintiffs, two lights, one over the other, three feet apart, according to the said statute. Verification.

Demurrer. Joinder.

S. Temple, for the plaintiffs.—The neglect of the plaintiffs to hoist two lights, as directed by the 53d article in the schedule to the Act, is no defence to the action. The 25th article contains an absolute and independent prohibition to all trawl boats from coming within three miles of boats fishing for herring or mackerel with drift nets. The hoisting lights is not a condition precedent to the obligation imposed by that article. [Lord CAMPBELL, C. J.—How are the persons in the trawl boats to calculate the distance, unless lights be shown by the other class of boats?] A difficulty might sometimes arise as to that: but here the *885] declaration states that the defendant, being *aware of the position of the boat of the plaintiffs, knowingly came within three miles. [COLERIDGE, J.—And the defendant's answer is, that he was not aware of the position of the boat of the plaintiffs, because she had not hoisted lights: that is, in effect, a plea of Not guilty. EBLE, J.—If the plea be good, the declaration is bad, for not averring the performance of the condition precedent.] The plea treats the hoisting of lights as a condition precedent: but it is not so; and therefore the declaration need not aver its performance; *Pordage v. Cole*, 1 Wms. Saun. 319 l. The hoisting lights is merely for better effectuating the other prohibition: at all events, the averment is unnecessary where knowledge on the part of the defendant is averred, as here. [Lord CAMPBELL, C. J.—I do not think that the question of knowledge enters into the case; the statute has laid down a positive rule, which we must assume admits of being obeyed.] Possibly the neglect of the plaintiffs to hoist lights might have been a defence in a proceeding to recover the penalties imposed, under article 75, for coming within the prescribed limits; but it is not so in a common law action for a private injury. [Lord CAMPBELL, C. J.—This action hardly comes within that definition; it is an action founded on the statute.]

Archibald, contra.—First, the plea is good. The declaration is for breach of a statutory duty: the plea, therefore, raises a good defence by showing that the plaintiffs were not following their occupation under the provisions of the statute, so that the statutory duty on the part of

the defendant did not arise. The hoisting *of lights is clearly a condition precedent to the right of the plaintiffs to sue in respect of the collision. [*886

Next, the declaration is bad. The averment of notice is not sufficient. It should have been averred, at all events, that the defendant knew that he was within three miles of the boat of the plaintiffs. Moreover, the declaration does not show that the collision took place in that part of the high seas to which the Act applies; that is, between the United Kingdom and France.

But, further, no action at common law lies for a collision caused by a breach of the statutory duty. Articles 69, 70, 71, 75, provide that all contentions of this kind shall be "submitted to the exclusive jurisdiction of the tribunal or the magistrates which shall be designated by law;" that is, in England, by sect. 11, any magistrate having jurisdiction in the place in which or in the waters adjacent to which the offence is committed, or to which the offender is brought; and that the proceedings shall be conducted in a summary manner before such tribunals, which are empowered to inflict pecuniary and other penalties for breaches of the statute, and to award compensation to the injured parties. This statutory remedy, being exclusive, ousts the plaintiffs of their remedy by action, according to the principle of the decisions in *Crisp v. Bunbury*, 8 Bing. 394 (E. C. L. R. vol. 21), and *Stevens v. Jeacocke*, 11 Q. B. 731 (E. C. L. R. vol. 63).

S. Temple, in reply.—The remedy by statute here is cumulative, not exclusive. The action is not simply for a breach of the statutory duty, but for consequential damage caused by such breach.(a) [ERLE, J.—In *Stevens v. Jeacocke* the plaintiff lost a large quantity of fish by the defendant's breach of the statute.] The fish were not his, except by the statute; there was no loss for which he could have sued at common law. Here the statutory remedy is not coextensive with the injury: the common law right of action, therefore, is not excluded; *Mayor of Lichfield v. Simpson*, 8 Q. B. 65 (E. C. L. R. vol. 55). *Albon v. Pyke*, 4 Man. & G. 421 (E. C. L. R. vol. 43), is also in point.

Lord CAMPBELL, C. J.—I am clearly of opinion that the last objection made by the defendant is fatal. No action can be maintained for such an injury as this. The defendant has violated the 25th article of the treaty, which, by sect. 1 of the statute, is to have all the force of an Act of Parliament. The declaration alleges that it was the defendant's duty to observe that article; and his neglect to do so is the breach laid. Now article 69 declares that all transgressions of these regulations shall be submitted to the exclusive jurisdiction of "the tribunal or the magistrates which shall be designated by law." Such tribunal is to decide "all differences" and "all contentions, whether arising between fisher

(a) See *Couch v. Steel*, 3 E. & B. 402 (E. C. L. R. vol. 77).

men of the same country, or between fishermen of the two countries. and, by articles 71, 75, may adjudge penalties, and award and enforce the payment of damages to the injured party. Then, if we refer to sect. 11, we find that the competent tribunal in England is "any magistrate or justice of the peace having jurisdiction in the county or place in which or in the waters adjacent to which the offence shall be committed or to which the offender shall be brought;" and, again, by sect. *888] 11, 14, such magistrate may impose *certain penalties, and award and enforce compensation to the party injured. For any breach, therefore, of the duties arising under these articles this specific tribunal affords the only remedy. It is unnecessary to notice the cases which point out under what circumstances it may be presumed that a remedy provided by statute for the breach of a duty created by it destroys the common law right of action; for the statute in the present case declares, most expressly, and with evident care, that the remedy which it provides is to be exclusive. It would be a clear infringement of the convention to bring an action in any of our courts against a French subject for a breach of the regulations; and it is equally a violation of the act to sue an English subject at common law for the same cause.

COLERIDGE, J.—I am of the same opinion. The statute creates an entirely new right and an entirely new duty, and provides, for disputes caused by the infraction of that right and breach of that duty, a tribunal with exclusive jurisdiction. That tribunal is to decide all differences and contentions, between fishermen either of the same or of the two countries, arising within its jurisdiction; and has power, not only to inflict penalties, but to award compensation to the injured parties. It is clear that its jurisdiction is not confined to mere breaches of the regulations, but extends to cases of consequential damage; for article 69, which expressly excludes from such jurisdiction certain offences, confines such exclusion to cases of murder, felony, or other grave crime. In the present case, therefore, the breach of duty complained of having been committed within the jurisdiction of the specific *889] *tribunal provided by the statute, no action at common law lies for such breach.

ERLE, J.—The plaintiffs complain that the defendant, when trawling, did not keep at a distance of three miles from their boat, they being engaged in drift net fishing. It is clear that this would have been no ground of complaint but for the statute; and the statute provides a specific and exclusive tribunal for the decision of all disputes between French and English fishermen arising within its jurisdiction. No action at common law, therefore, will lie where, as in the present case, that tribunal has jurisdiction in the dispute. *Mayor of Lichfield v. Simpson*, 8 Q. B. 65 (E. C. L. R. vol. 55), and *Albon v. Pyke*, 4 Man. & G. 421 (E. C. L. R. vol. 48), are not in point. In the first of those cases the remedy created by statute was no extensive with the injury; in the

second the action was brought upon a promissory note, which did not appear to have been taken for money lent, and the statute did not create any right to bring such an action.

(CROMPTON, J., was absent.)

Judgment for defendant.

***Ex parte PHILLIPS.** *June 18.*

[*890

Reported, 2 E. & B. 192 (E. C. L. R. vol. 75).

KERNOT v. PITTIS. *June 18.*

Reported, 2 E. & B. 406 (E. C. L. R. vol. 75).

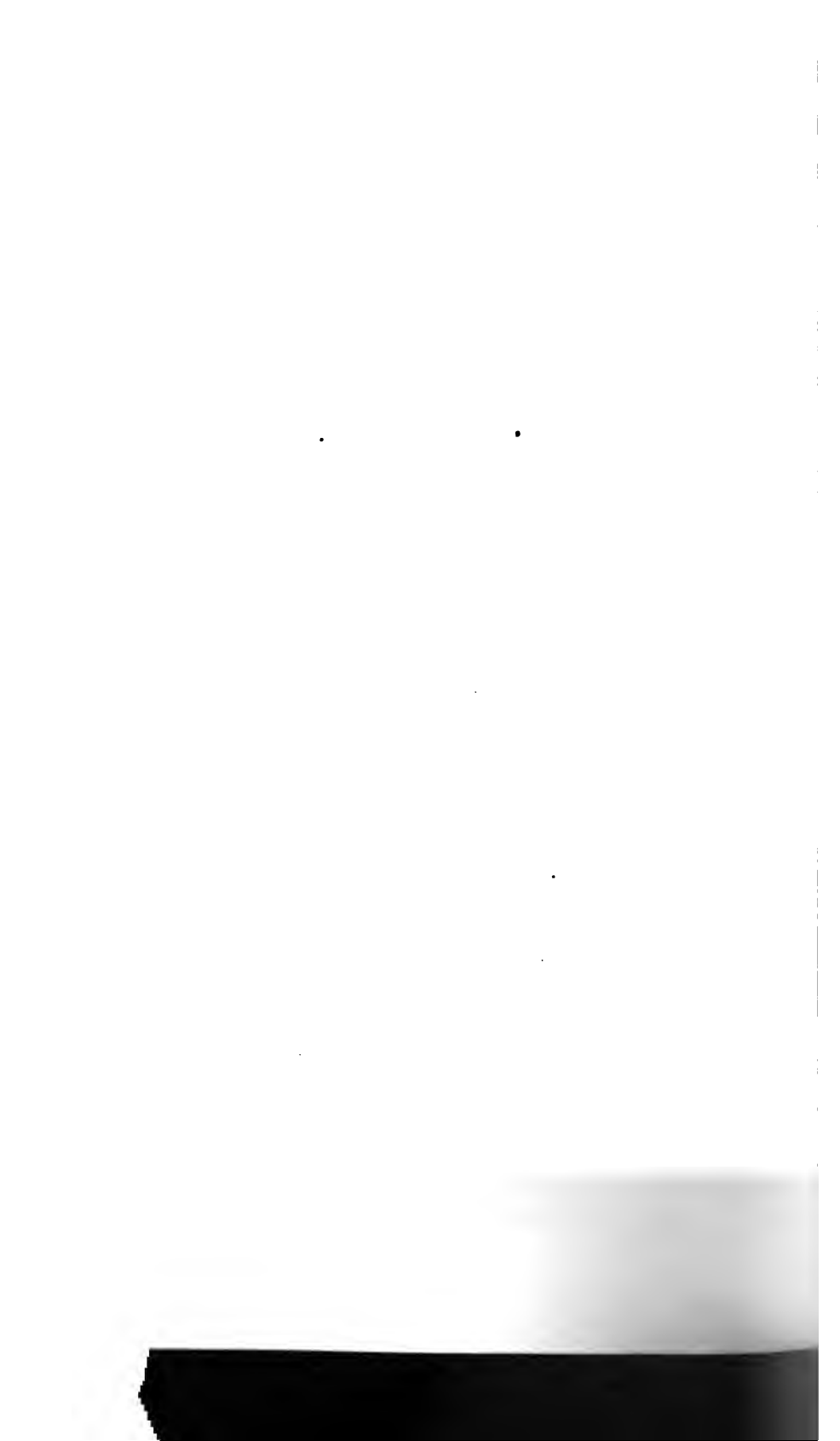
The QUEEN v. The Churchwardens and Overseers of the Township of LONGWOOD. *June 18.*

Reported, 17 Q. B. 871 (E. C. L. R. vol. 79).

MEMORANDUM.

IN this Vacation, Richard Matthews, of the Middle Temple, Esquire, and Ralph Thomas, of the Middle Temple, Esquire, were called to the degree of Serjeant-at-Law, and gave rings with the motto *Hoc age*.

END OF TRINITY VACATION.



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Held, by Lord Campbell, C. J., Wightman and Crompton, Js., That the plaintiff could not recover even nominal damages.

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T. owed to P. & Co., before their bankruptcy, 275*l.* as surviving partner of T. Y. & Y., and 6565*l.* due independently of that partnership. As part security for the latter debt he had given P. & Co. a mortgage for 5000*l.* Plaintiff, the official assignee of P. & Co., wrote to T.: "By the books of the bankrupts, there is a balance of 275*l.* standing against you;" and requested immediate payment. T. replied: "You have no occasion to blame yourself respecting any claim on me from the estate of P. & Co. The matter has been arranged with the assignees here; and at the last meeting it was arranged that I should pay 450*l.* on the 20th of May, 450*l.* on the 20th of August, 450*l.* on the 20th of November, and 450*l.* on the 20th of February, next; after which I am in hopes that I shall be able to transfer the 5000*l.* mortgage, to enable me to clear off the whole that may be standing against me." It was admitted that the instalments of 450*l.* were to be paid in respect of the debt of 6565*l.*, that the mortgage mentioned in the letter was the mort-

gage for 5000*l.* given as part security for that debt, that the 275*l.* mentioned by the official assignee was the debt due to P. & Co. from T. as surviving partner of T. Y. & Y., and that T. had paid off the 6565*l.* before the present action was brought against the defendants, his executors.

Held, on error and bill of exceptions, that the Judge was right in directing the jury that the two letters did not amount to a sufficient acknowledgment or promise to take the debt of 275*l.* out of the Statute of Limitations, 21 Jac. 1, c. 17, s. 3, the letters not containing any absolute acknowledgment of a debt, or unqualified promise to pay, but only expressing a hope that, on the transfer of the mortgage, T. might be able to clear off the whole that might be standing against him. *Smith v. Thorne*, 134

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Held, that no action can be maintained for the breach of any article of the convention or for, damage caused by such breach, the remedy provided by the statute being exclusive. *Marshall v. Nicholls*, 882

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Held, that the order, upon the face of it was insufficient, inasmuch as it did not show any adjudication, express or implied, of the truth of the matters of complaint. *Regina v. Williams*, 393

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1. When certain landowners or their agents are made commissioners by statute: manner and time of appointment.

A local drainage Act created the lords or ladies of three manors, or, in his, her, or their absence, their agents appointed in writing under their hands, commissioners for executing the Act; it authorized the commissioners to take lands for the purposes of the drainage; and it contained clauses for that purpose to the same effect as those in the Leeds Clauses Consolidation Act, 1845 (3 & 4 Vict.

c. 18), subsequently passed: And it provided that no person should be capable of acting as a commissioner or agent for a commissioner till he had made a declaration that he would duly execute the powers in the exercise of which he should act as commissioner or agent.

The three lords of the manors, by writing under their hands respectively, appointed the defendants their agents; but without having first made the declaration. The defendants acted as commissioners (first making the declaration), and gave plaintiff a written notice that they required to take, for the purposes of the Act, 3 acres, 1 rood, 25 perches, of his land: describing the specific acres, rood, and perches. Plaintiff refused to treat; and the commissioners thereupon issued a warrant to the sheriff of the county to summon a jury to assess the sum to be paid for the purchase of 3 a. 1 r. 25 p. of land, required for the purposes of the Act; but the warrant did not recite or refer to the notice, nor describe specifically which 3 a. 1 r. 25 p. were required. Plaintiff had two hundred acres of land in the district. Both the notice and warrant were in the defendants' names as commissioners. A jury was impanelled, and assessed the price of 3 a. 1 r. 25 p. pointed out to them, which were in fact the same land specifically described in the notice. An inquisition was drawn up, reciting the warrant but not the notice, and not showing specifically in respect of which 3 a. 1 r. 25 p. of plaintiff's land the price was assessed. Plaintiff, who had throughout protested against the proceedings, refused to receive the price so assessed. Defendants paid it into the Bank (under a section in the Local Act enabling them so to do), and entered on the land. Plaintiff having thereupon brought an action against them:

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench,

That the lords and ladies of the manors were commissioners by virtue of the local Act, and, if they did not choose to officiate, might appoint agents for such time as they thought proper; which agents thereupon became commissioners, and might issue notices and warrants in their own names, and were not bound to show on the face of their proceedings for what lord or lady they respectively acted:

That such appointment of an agent was well executed though the lord or lady had not previously made the declaration required by the local Act.

And that the inquisition was good, though it did not, directly or by reference, specify the particular acres, rood, and perches for which the commissioners were to pay. *Ostler v. Cook*, 331

2. Agency of directors of a non-registered joint stock company, 2. ASSURANCE, I.
3. Agency of attorney to assignees of bankrupt, 503. Post, II. 1.

II. Liability of agent to third persons.

1. What is not a contract of the agent himself.

Assumpsit on a promise that, if the assignees of a bankrupt would permit the sale of his goods, defendant would pay plaintiff the net proceeds to the amount of his debt secured on such goods. Plea: Non assumpsit. On the trial it was proved that defendants, being solicitors to the assignees, wrote to plaintiff's solicitor, saying "In consideration of" plaintiff's "consenting to the sale" "we hereby, on behalf of the assignees, consent that the net proceeds" shall be paid to plaintiff. This offer was accepted; the goods were sold; but the net proceeds were not paid over. The letter was written by the authority of the trade assignees, but not known to nor ratified by the official assignee. Other subsequent letters were in evidence. Nonsuit with leave to move.

Held: that subsequent letters were not admissible to aid in construing the contract in the first letter. That, on the true construction of the letter, defendants did not contract themselves, but made the contract for the assignees: that the trade assignee had no authority to bind the official assignee personally: but that this absence of authority did not make defendants liable on the contract as principals; and that the nonsuit was right.

Semble: that in such cases there is an implied undertaking by the professed agent that he has the authority he professes to have. *Lewis v. Nicholson*, 503

2. What not such an absence of authority as to make the agent liable, 503. Ante, 1.
3. Implied undertaking as to authority, 503. Ante, 1.

III. Liability of principal to third persons.

Liability of corporation for its servants acting without formal authority, 736, 742. COMPANY, I. 1.

IV. Proceedings by.

When they need not show for whom they are acting, 831. Ante, I. 1.

V. Ratification.

Effect of non-ratification by one of several principals, 503. Ante, II. 1.

VI. Occupation by.

Liability of corporation, 632. CORPORATION, I. 1.

AGREEMENT.

See CONTRACT

ALEHOUSE.

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ALTERATION.

In dominant tenement, 112. *EASEMENT*, III.

AMBIGUITY.

In form of instrument.

Bill or note, 471. *BILLS*, I.

AMENDMENT.

At Nisi Prius, 640. *EXECUTORS*, I. 1.

ANCIENT LIGHT.

See *EASEMENT*.

ANNUITY.

Surety bond.

Successive breaches: statute of limitations;
bankruptcy, 593. *BOND*, I.

APPEAL.

I. From decision of judge at chambers.

Within what time to be made.

In April, 1851, plaintiff recovered in a superior Court a sum under 40s. In June, 1851, he took out a summons before a Judge at Chambers, for costs, under stat. 13 & 14 Vict. c. 61, s. 13. The Judge, conceiving that, although concurrent jurisdiction was proved, he had a discretion as to making an order for costs, endorsed the summons with the words "no order." In January, 1852, plaintiff moved the Court of Queen's Bench to be allowed the said costs.

Held, that the application must be considered as an appeal from the decision of the Judge at Chambers; and that it was made too late.

Per Lord Campbell, C. J.—Applications in the shape of an appeal from the decision of a Judge at Chambers should be made within the term next after such decision. *Meredith v. Gittins*, 257

II. To sessions: Borough or County.

Appeal against order of maintenance of pauper lunatic, 361. *POOR*, XII.

III. Time of appealing.

Against decision of Judge at chambers, 257. *Ante*, I.

IV. Notice sent by post.

At what time deemed to have been given, 388. *POOR*, X.

V. Contesting appeals.

Consent of vestry, 682. *POOR*, V. 1.

VI. Hearing: interested justice.

1. What is interference of an interested justice, and the consequences, 416. *CERTIORARI*, I.

2. What accidental presence without interfering does not vitiate.

The mere presence on the Bench of an interested magistrate during part of the hearing of an appeal is not sufficient ground for setting aside an order of Sessions made on such hearing, if it be expressly shown that he took no part in the hearing, came into Court for a different purpose, and did not in any way influence the decision. *Regina v. London, Justices*, 421 a.

VII. In particular instances.

Against order of maintenance of pauper lunatic, 361. *POOR*, XII.

APPEARANCE.

Recognition to appear and answer indictment. *Reg. Gen.* 251

APPLICATION.

Second application.

Renewal when allowed on supplying defect of mere form.

The attestation of a warrant of attorney was as follows: "Signed, sealed, and delivered," &c., "in the presence of me, H. C." (an attorney), "who, at the request and in the presence of the said J. H. B., J. C., and J. H. P." (the executing parties), "have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them and each of them the nature and contents hereof. H. C."

Held, not a sufficient compliance with stat. 1 & 2 Vict. c. 119, s. 9.

On motion to set aside a Judge's order made at Chambers upon reading certain affidavits, the party moving omitted to bring before this Court the affidavits produced at Chambers; and the rule was therefore discharged with costs. Held, that he might (after payment of costs) renew the same motion, putting in the affidavits. *Pecock v. Pickering*, 789

APPOINTMENT.

Of agent to act as commissioner under a local act, 831. *AGENTS*, I. 1.

APPORTIONMENT.

Salary when not apportionable.

The salary of an auditor and superintending manager of an estate, holding office during the joint lives of the employer and himself, is not a payment apportionable under stat. 4 & 5 W. 4, c. 22, s. 2.

The indenture by which L., the auditor, engaged himself stipulated that L., who was a barrister, should relinquish so much of his

practice as was incompatible with the office, and the whole if required by S., the employer: that, if S. should revoke the appointment without adequate cause, the adequacy to be determined as after mentioned, or if L. should resign upon adequate cause, the adequacy to be determined in like manner, S. should allow L. a retiring pension of 1000*l*. a year during their joint lives: and that the adequacy of the cause for any revocation or resignation should be determined by a referee, who was named; with a proviso for other reference in case of necessity. Held:

That the stipulation for reference was not void as ousting the Courts of jurisdiction. But

That L., being dismissed, as he alleged, wrongfully, might sue for the retiring pension without having first procured the adequacy of the cause to be decided upon by the referee; the sense of the agreement being that the onus of proving the adequacy of the cause to be adjudicated upon should lie upon that party who did an act (whether revocation or resignation) determining the employment. *Lowndes v. Stamford, Earl*, 425

APPREHENSION.

See ARREST.

ARBITRATION.

Prospective covenant that a preliminary matter shall be determined by a referee.

1. When not void as ousting Court of jurisdiction, 425. APPORTIONMENT.
2. Burthen of compliance, on which party it lies, 425. APPORTIONMENT.

ARGUMENTATIVENESS.

In pleading, 2. ASSURANCE, I.

ARMY.

Pay, 692. EAST INDIA COMPANY.

ARREST.

On criminal charge.

Pleading: belief: new assignment, 378. IMPRISONMENT.

ASSIGNEE.

- I. When bound by covenant though not named, 661. COVENANT, I. 1.
- II. Of bankrupt. BANKRUPT.

ASSUMPSIT.

Indebitatus.

Against corporation, for use and occupation, 632. CORPORATION, I. 1.

ASSURANCE.

I. Parties.

Joint or several liabilities of subscribing or non-subscribing directors.

Declaration against five defendants stated that defendants were proprietors and shareholders of, and partners in, a company called The M. Assurance Company: that plaintiff caused to be made a policy on ship, &c., purporting that he made insurance at and from, &c., against certain risks, which the said Company were contented to bear: and it was declared and agreed by and between the Company and the assured, That the capital stock and funds of the Company should alone be liable to answer and make good all demands under the policy, and that no proprietor of the Company should be in anywise liable to any demands, nor be in anywise charged, by reason of the said policy, beyond the amount of his share in the capital stock, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietors should in all cases and under all circumstances be limited to their respective shares in such capital stock: And the policy further stated that the Company were contented, and bound themselves, to the assured for the true performance of the premises: The count then alleged that, in consideration that plaintiff had paid the premium and promised defendants to perform all things in the policy contained to be performed on his part, defendants promised plaintiff that they would become and be insurers to plaintiff of 1100*l*. on the said ship during the time in the policy mentioned, and would perform all things therein contained on their part as such insurers of 1100*l*. to be performed; and defendants then became and were insurers to plaintiff, and subscribed the policy as such insurers of 1100*l*. on the said ship. The count then averred total loss, and non-payment although the capital stock and funds of the Company had always been sufficient to pay plaintiff the 1100*l*.

One defendant demurred to the count, alleging uncertainty, and other grounds of special demurrer.

A second, J. G., pleaded Non Assumpsit; and that the stock and funds had not been and were not sufficient.

A third pleaded that the policy was made after stat. 35 G. 3, c. 63, and that defendants' name was not expressed or specified on the policy; whereby the insurance became and was null: Special demurrer, alleging that the plea was an argumentative denial of defendant's subscription.

A fourth defendant pleaded that he was proprietor of fifty shares only, of 100*l*. each, and, before action brought, had paid claims

and demands upon the Company in respect of insurances, to the amount of more than 5000*l.*, of his own moneys. Demurrer to the plea as being an argumentative denial of the sufficiency of the capital stock, and as amounting to a traverse of the promise, and as 'un- certain.

Held by the Court of Queen's Bench :

That the policy, as set out in the declaration, shewed a joint liability, capable of being enforced at law if the Company had sufficient capital stock and funds ; which it appeared by the count they had : That an execution of the policy by the defendants sufficiently appeared : and that the count was good both on general and on special demurrer.

And that no material distinction arose in the case of the fourth defendant from his having paid on policies a sum equal to his subscription.

Also, as to the third defendant, that, the insurance being stated in the declaration to have been made by the Company, of which he was one, it was immaterial, since stat. 5 G. 4, c. 114, that individual subscribers were not named in the policy.

And, by Erle and Wightman, Js., that his special plea was an argumentative Non Assumpsit.

On the trial of the cause, the second defendant, J. G. (no other appearing), tendered a bill of exceptions. The evidence and ruling which raised the exceptions were as follows :

The defendants were associated in a partnership for the purpose of effecting insurances ; the capital to consist of 1,000,000*l.*, divided into 100*l.* shares. In fact, shares to the amount of 500,000*l.* only had been taken, upon which calls had been paid to the extent of 25*l.* per share, and a partial payment made on another call of 10*l.* The Company's deed of settlement provided that the affairs should be managed by a Board of directors, who should issue policies signed respectively by three directors (they being indemnified out of the funds), and should cause it to be stated in every policy that the subscribed capital of 1,000,000*l.*, and other the stocks, funds, and property of the Company unapplied at the time of any claim or demand, should alone be liable to any claim under such policy ; that the directors signing, or any of them, should not be responsible to the assured beyond the funds, &c., in their hands or power at the time of recovery on the policy ; and that no proprietor should in any event be liable beyond the amount unpaid on his share. The deed further provided that any proprietor sued in respect of any policy might give notice to the Board, and they might take the defence upon themselves, indemnifying such proprietor ; and, if they should not do so, and the proprietor should be compelled to pay the debt, and s^hould not be

reimbursed by the directors, provision was made for enabling him to recover the debt and costs against the proprietors individually.

The policy in question was in the form always adopted by the Company. It was headed "M. Assurance Company. Capital, one million ;" and was executed by three directors, who were stated therein to sign in witness of the premises and that the Company were content with the assurance. Defendant J. G. was a director, but did not sign. The policy was as set forth in the declaration, with clauses limiting responsibility to the capital and funds of the Company, and exempting individual shareholders, except to the amount of their respective shares, but omitting the stipulation directed by the deed, that the directors signing should not be liable beyond the funds in their hands. Evidence was given for the defendant that the Company had not, when the cause of action accrued, or afterwards, "any moneys, property, or available funds whatever in their hands" wherewith they could have satisfied plaintiff's claim.

The Judge ruled that the matters proved were evidence on which the jury would be justified in finding for the plaintiff on both issues ; and that the Company had available capital stock and funds while a portion of the capital stock sufficient to pay the plaintiff remained uncalled for.

Held by the Court of Exchequer Chamber, affirming the judgment in Q. B.,

That the first count was good on general demurrer, inasmuch as it expressly stated a joint contract made by the defendants, which might be enforced by law. Platt, B., dissents.

That the count was also good on special demurrer, being sufficiently certain.

That the third defendant's plea, founded on stat. 35 G. 3, c. 63, was bad on general demurrer.

Judgment was also affirmed on the plea of the fourth defendant.

Held, further, in the Court of Exchequer Chamber, on the bill of exceptions :

By Talfourd, J., and Parke, Alderson, Platt, and Martin, Bs. ; That there was no evidence of a joint contract by the defendants.

By Cresswell and Williams, Js. ; That there was evidence of such joint contract, and of a sufficiency of capital stock and funds. And, by Cresswell, J., that the clause in the deed of settlement, exempting every proprietor from liability beyond his own unpaid subscription, was either insensible, or void as being repugnant to the rest of the deed.

Semble, by Talfourd, J., and Platt, B., and held by Martin, B., that there was evidence of a several contract by each defendant with

the assured to the amount unpaid on such defendant's shares.

Quere, per Parke and Alderson, B., whether the policy, not being conformable to the power vested in the directors by the deed of settlement, was binding on the defendants.

A venire de novo was awarded. *Hallett v. Dowdall*, 2

II. Policy: subscription.

By a director of a company who is not individually named in the policy, 2. *Ante*, I.

III. Policy: conformability to powers.

Effect of policy not being conformable, 2. *Ante*, I.

IV. Limitations of liability.

1. To subscribed capital of insuring company, 2. *Ante*, I.

2. To funds available in the hands of the directors, 2. *Ante*, I.

3. Of shareholder, to amount of his shares, 2. *Ante*, I.

4. Repugnancy, 2. *Ante*, I.

V. Pleading.

1. What declaration shows a joint contract, 2. *Ante*, I.

2. Declaration when sufficiently certain, 2. *Ante*, I.

3. Argumentative denial of subscription, 2. *Ante*, I.

VI. Evidence.

1. Of joint contract by shareholders of insuring company, 2. *Ante*, I.

2. Of several contract by each shareholder to the amount of his shares, 2. *Ante*, I.

3. Of sufficiency of capital, 2. *Ante*, I.

ATTESTATION.

Of warrant of attorney, 789. APPLICATION.

ATTORNEY.

I. Signature of documents by.

Notice of application for certiorari, 416. *CERTIORARI*, I.

II. Attestation by.

Of warrant of attorney, 789. APPLICATION.

III. Contracts by.

1. What not his own contract but that of his client, 503. *AGENT*, II. 1.

2. Liability incurred by acting without authority, 503. *AGENT*, II. 1.

IV. Attendance by.

When not on proceeding before Vice-Chancellor of University, 647. *UNIVERSITY*, I.

V. Warrant of attorney. WARRANT OF ATTOR-

AUDITOR.

I. Poor law auditor, 682. *POOR*, V. 1.

II. Of an estate, 425. *APPORTIONMENT*.

AUTHORITY.

Liability incurred by persons acting as agents without authority, 503. *AGENT*, II. 1.

BAILMENT.

I. Liabilities of the same nature as those of a bailee.

Treasurer of a building society, 277. *BUILDING SOCIETY*, I.

II. Excuses for loss by bailee.

Vis major, 277. *BUILDING SOCIETY*, I.

BANK.

I. Deposits.

Of notes subsequently dishonoured: who to bear the loss.

Plaintiff deposited with defendants, a banking Company, 80*l.*, consisting partly of certain notes of a country bank, payable either at that bank or in London, and representing 65*l.* The Company gave a receipt as follows: Received of M. W. 80*l.*, for which we are accountable. 80*l.*, at 3*l.* per cent. interest, with fourteen days' notice.

The Company sent the notes, on the same day, to their agents in London, who presented them on the following day, when they were dishonoured. The agents sent them back by that evening's post to the Company, who, on the following day, gave notice of dishonour to plaintiff, and, on plaintiff's giving fourteen days' notice of withdrawal, tendered the notes back, which plaintiff refused. The Company refused to pay the amount of the notes. The country bank, which was about five miles from the office of the Company, had stopped payment from the close of the day on which the notes were deposited.

Held, that plaintiff could not recover the amount of the notes from the Company, either as money lent or as money had and received. *Timmins v. Gibbins*, 722

II. Bank notes.

Effect of transactions with, 722. *Ante*, I.

BANKRUPT.

I. Assignees: powers inter se.

Limited authority to bind each other, 503. *AGENT*, II. 1.

II. Rights under sect. 137, as against executions and on orders not filed.

Judgment signed on Judge's order made on defendant's own application but not filed.

A. having commenced an action of debt in the Queen's Bench against B., a trader, B. proposed that a Judge's order should be made for stay of proceedings upon payment of debt and costs, and sent to A. a summons for that purpose, upon which a consent was endorsed by A. A Judge's order was thereupon made, at the instance of B., directing proceedings to be stayed on payment of debt and costs; in default of payment judgment to be signed and execution to issue. B. served a copy of this order on A. Neither the original order, nor any copy of it, was filed with the clerk of the dockets and judgments in the Queen's Bench, as directed by stat. 12 & 13 Vict. c. 106, s. 137. Judgment was signed and execution taken out, under the order: and the sheriff paid to A., from proceeds of the sale of certain goods of B., the debt and costs for which execution had issued. After the execution and payment, B. became bankrupt.

Held that, under stat. 12 & 13 Vict. c. 106, s. 137, the order, judgment, and execution were void as against B.'s assignees, the order not having been filed; and that the assignees might recover from A. the amount paid him under the execution, as money had and received to their use as assignees. *Farrow v. Mayes*, 516

III. Money had and received to use of assignees.

Money paid under a void execution before act of bankruptcy, 516. *Ante*, II.

IV. Discharge of bankrupt from liabilities.

Not on future breaches of surety bond, 593. *BOND*, I.

BAR.

Distinction between a bar and a suspension, 849. *RAILWAY*, I. I.

BARON AND FEME.

I. Living apart: *habeas corpus*.

Where a wife is, by her own desire, living apart from her husband, and is under no restraint, the Court will not grant a *habeas corpus* on the application of the husband, for the purpose of restoring her to his custody. *Regina v. Leggatt*, 781

II. Competency as witnesses.

Stat. 14 & 15 Vict. c. 99, does not remove the objection to admitting as a witness the wife of a party to the record. So held by Lord Campbell, C. J., Wightman and Crompton, J.; Erie, J., dissentiente. *Stapleton v. Crofts*, 367

III. Wife's incapacities.

Her incapacity to take case out of statute of Limitations by payment of interest, 262. *BILLS*, II.

IV. Pleading.

Joinder of wife where husband's payment of interest has taken case out of statute of limitations, 262. *BILLS*, II.

BEER.

License to sell beer by retail.

I. The granting not revised on certiorari.

The resident holder and occupier of a house annually rated at above 15*l.*, in a town corporate with a population of more than 5000, called upon the overseers for certificates to enable him to apply, under stat. 3 & 4 Vict. c. 61, for a license to sell beer by retail. The overseers gave him a certificate of the amount at which the house was rated, and attached their certificate, as directed by stat. 4 & 5 W. 4, c. 85, to the certificate of character produced by him; but refused to certify that he was the resident holder and occupier of the house. The Board of Inland Revenue, being satisfied, on inquiry, that he was the resident owner and occupier, directed their officers to grant a license.

Held, on motion to quash the license, which had been brought up by certiorari, that the granting of the license was not a judicial act capable of revision by the Court on certiorari. *Semble* that the proper mode of trying its validity was to treat it as void. *Regina v. Salford, Overseers*, 687

II. Validity how to be tried, 687. *Ante*, I.

BELIEF.

Of charge of felony: pleading, 378. *IMPRISONMENT*.

BENEFIT SOCIETY.

See *LOAN SOCIETY*. *BUILDING SOCIETY*.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. What is a bill or note.

Instrument in ambiguous form.

An instrument was drawn in the following form: "Two months after date I promise to pay to T. R. L." (plaintiff) "or order 99*l.* 15*s.* H. Oliver." Underneath was written, on the left hand of the instrument, "J. E. Oliver" (defendant). Across it was written "accepted, payable S. & Co., Bankers, London. E. Oliver." "E. Oliver" was signed by defendant.

Held, that the instrument might be sued upon as a bill of exchange drawn by H. Oliver upon, and accepted by, defendant.

Per Lord Campbell, C. J. Such an instrument would be good as a bill of exchange, as against *_____*, even before acceptance. *Lloy _____*, 431

II. Note made by wife before coverture.

Effect of payment of interest by wife after marriage with money sent by joint maker.

Declaration against husband and wife, upon a joint and several promissory note made by the wife, before coverture, and one J. A., alleged a promise by the wife, *dum sola*. Defendants pleaded the Statute of Limitations. The declaration was amended, after issue, by inserting an allegation of a subsequent promise by the husband. Plaintiffs proved a payment of interest within six years, made by the wife after marriage, with money sent by J. A., but without the privity or subsequent ratification of the husband.

Held, that such payment raised no promise, either by the husband or the wife, so as to take the case out of the Statute of Limitations: inasmuch as, the wife being incapable of making any promise in law, express or implied, payment by her or the other joint maker of the note could create no promise on her part; and, as such payment was not made by the husband, or for any consideration affecting him, or with his sanction, it raised no implied promise on his part.

Per Lord Campbell, C. J.: If the payment had been by the husband, or with his sanction, the declaration, as amended, would have been bad in arrest of judgment, as the wife would then have been improperly joined in the action. *Neve v. Hollands*, 262

III. Direction.

What it means, 471. *Ante*, I.

IV. Illegal consideration.

Buying off opposition in Insolvent Court.

To an action by payee against maker of a promissory note, the defendant pleaded that before the time of the making he was indebted to plaintiff and others, and filed his petition in the Insolvent Debtors' Court, and delivered a schedule, including his debt to the plaintiff, and a day was appointed for his examination. That plaintiff threatened to oppose his discharge unless defendant would give him promissory notes to the amount of his debt: and thereupon defendant, to induce plaintiff to abandon his opposition, made and delivered to him promissory notes, one of which was that now declared upon. And that defendant afterwards, by order of the said Court, was discharged, according to stat. 1 & 2 Vict. c. 110, from the said debt in respect of which the last-mentioned note was given; which discharge remains in full force.

Samble, by Wightman, Erie, and Crompton, Ja., and Held by Lord Campbell, C. J., that the plea was double, and bad on demurrer. Leave to amend granted. *Heeslaine v. Sixty*, 443

— position by will.

1. The right to sue passes to the executor.

Stat. 7 W. 4 & 1 Vict. c. 26, s. 3, empowering a testator to bequeath all personal estate which, if not bequeathed, would devolve upon his executor, does not enable a testator to bequeath a promissory note made to him, so as to pass the right to sue in respect of it. Such right is in the executor.

Where the legatee of such promissory note is convicted of felony, the forfeiture caused by such conviction does not divest the executor of his right to sue, though he is a trustee for the Crown in respect of the proceeds of the suit. *Bishop v. Curtis*, 878

2. Effect of legatee being convicted of felony, 878. *Ante*, I.

VI. Dishonour.

Of notes of country bank: effect on transactions, 722. *BANK*, I.

VII. Payment.

By endorser pendente lite against acceptor, how to be pleaded.

To an action by endorsee of a bill of exchange against acceptor, defendant pleaded that *puis darrein continuance*, an earlier endorser had paid to plaintiff, then being holder, and plaintiff accepted the full amount of the bill, and all interest thereon, in full satisfaction and discharge of the bill and all moneys due in respect thereof (not mentioning damages or costs).

Held, on demurrer, a bad plea. *Goodwin v. Gremer*, 757

VIII. Pleading and evidence.

1. Count on an account stated, where the instrument itself cannot be read in evidence, 252. *ACCOUNT STATED*, I.
2. Plea: Note given to buy off opposition in Insolvent Court, and discharge by that court: duplicity, 443. *Ante*, IV.
3. Plea of payment pendente lite by another party liable, 757. *Ante*, VII.

IX. Checks. *CHECK*.

BOARD OF INLAND REVENUE.

Granting of beerhouse licenses, 687. *BEER*, I.

BOND.

I. Condition.

The liability of the obligor when that of a surety only.

Declaration, on the obligatory part only, upon two bonds, dated in 1828 and 1829 respectively.

Pleas: 3. That the alleged causes of action did not accrue within twenty years. 4. That after the making of the bonds, and before the commencement of the action, defendant became bankrupt, and that the said causes of

action accrued before such bankruptcy. Replication, joining issue on the fourth plea, and, to the third plea, that the said causes of action did accrue within twenty years. Issue thereon.

The plaintiff then (by enrolment on the record) set out the bonds and the conditions. The first bond stated that J. Mather and defendant bound themselves, and each of them, by himself, his heirs, &c., to the plaintiff in the sum of 300*l*. The condition (after reciting that the said J. M. had agreed with plaintiff for the sale to him for 150*l*. of an annuity of 20*l*. to be paid to plaintiff, his executors, &c., during the joint and several lives of plaintiff and his wife, and the survivor; that J. M. had requested defendant to join in and execute the bond, which he had agreed to do, for securing the regular payment of the annuity; and that the 150*l*. had been paid to J. M.) was for payment of the annuity, by J. M. or defendant, or their or either of their heirs, &c., some or one of them, by equal half-yearly payments, on, &c., during the joint and several lives of plaintiff and his wife, and of the survivor, and a proportionate part in case of the survivor dying between the days of payment. The second bond and condition were similarly framed for the payment, by and to the same parties, of an annuity of 10*l*. The plaintiff then suggested that, in 1851, two and a half years' arrears were due in respect of each annuity, and were still unpaid.

At the trial, it appeared that the defendant had become bankrupt in 1836; that J. M. had paid the annuities half-yearly down to 1848, but never till after the day of payment fixed by the condition, so that there had been breaches of the condition twenty years before action, and before the bankruptcy; and that the arrears suggested by plaintiff were still due. Plaintiff had not attempted to prove as annuity creditor under defendant's bankruptcy.

Held, that a new cause of action arose upon each successive breach of the condition; that, on the record as it stood, plaintiff was entitled to prove, at the trial, breaches within twenty years; and that, on such proof, he was entitled to a verdict upon the issue on the Statute of Limitations.

Held, further, by Lord Campbell, C. J., and Erie, J., dissentiente Wightman, J., that defendant's liability under the bonds and conditions was that of a surety only; that J. M. was the principal, and grantor of the annuity: that plaintiff, therefore, could not have proved, under defendant's bankruptcy, in respect either of the penalties or of the breaches of condition committed before the bankruptcy; and that consequently the matter pleaded and proved was no bar to the action. *Aston v. Holden*, 593

II. Statute of Limitations.

New causes of action on successive breaches, 593. *Ante*, I.

III. Bankruptcy.

Bankrupt surety not discharged as to subsequent breaches, 593. *Ante*, I.

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See MUNICIPAL CORPORATION.

BREACH.

I. Successive causes of action on successive breaches, 593. *BOND*, I.

II. Of covenant to cultivate according to custom of country, 661. *COVENANT*, I. I.

III. Waiver, 593. *BOND*, I.

BRIDGE.

I. Liability of county to repair generally.

1. Effect of conventional arrangement between the county at large and a particular division.

The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the island, not repairable by tenure, were repaired either by the tithings, parishes, or townships in which they were situate, or from rates levied on all the parishes in the island, under the following circumstances. The island having been assessed to the general county rate, and appeal against such assessment having been entered, an arrangement was made, in 1774, by consent, under an order of Quarter Sessions, fixing certain proportions to be paid by the parishes in the island towards the general county rate, but leaving the expense of bridges and the house of correction in the island to be raised by a local rate; the island being adjudged and declared not to be liable to pay to the county bridge rate or county house of correction; and the inhabitants agreeing to erect and maintain houses of correction and bridges within the island at their own sole expense. After this arrangement, the practice was for the county Quarter Sessions, on the application of the justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the island bridges and bridewell. Till 1842, there had been no instance of the general county rate being applied to the repair of the island bridges. In 1813 stat. 53 G. 3, c. xcii., appointed commissioners for the repair of the highways in the island, with power to make assessments, and enacted that all

bridges previously repaired by any parishes, tithings, divisions, or townships in the island should, for the future, be repaired "in such and the same manner, and by such and the same ways and means," "as other bridges" "usually called county bridges" within the island had been accustomed to be repaired. In 1842, and since, the island was assessed generally with the county, and no separate island rate made. Application for the repair of bridges and bridewells in the island had been, since that time, made to the county Quarter Sessions.

Held, that all bridges which, at the time of the passing of the Act, were repairable by the tithings, &c., in which they were situate, were for the future repairable by the county generally; and that the arrangement of 1774 did not affect the legal liability of the county, and was no answer to an indictment against it for non-repair of such bridges.

A bridge in the island, originally repaired by the tithing, was, after the passing of the Act, wholly rebuilt by order of the justices for the island division. The new bridge was larger than the old, and different in form, and stood higher up the stream. The expense of the building and of repairs, were defrayed out of the island rate imposed under the arrangement of 1774. The conditions prescribed by stat. 43 G. 3, c. 59, were not observed in building it.

Held, that the county was liable to repair the new bridge.

A foot bridge formed of three planks, nine or ten feet long, and a hand rail, and which carried a public foot-path across a small stream, was held not to be repairable as a county bridge, though it had been repaired by the commissioners under the above-mentioned local Act. *Regina v. Southampton, County*, 841

2. Effect of enactment that bridges heretofore repaired by parishes, &c., shall be repaired as bridges called county bridges have usually been repaired, 841. Ante, 1.

II. Liability of county to repair: what bridges.

1. An enlarged bridge at a different point, 841. Ante, I. 1.

2. Not a foot bridge, 841. Ante, I. 1.

III. Statute 43 G. 3, c. 59.

Effect of non-compliance with provisions, 841. Ante, I. 1.

BUILDING SOCIETY.

I. Treasurer.

When not responsible for moneys taken from him by *vis major*.

The treasurer of a Benefit Building Society within stats. 6 & 7 W. 4, c. 32, and 10 G. 4, c. 56, having covenanted with the Society's

trustees that he will faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duties, and punctually account to the trustees for all and every sum and sums of money, bills, notes, securities, goods, and chattels, which he, in his office of treasurer, shall receive on the Society's account, and being bound, by the rules of the Society, to pay over in a given time the same moneys which he shall receive, does not violate such obligation if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence and without fault of his own; such obligation being that only of a bailee.

So held in an action by trustees of such Society against sureties of a treasurer, complaining that he had not paid the said moneys, to which the sureties pleaded such robbery, committed upon their principal, in excuse of his non-payment. *Walker v. British Guarantees Association*, 277

II. Nature of his obligation as to money, 277. Ante, I.

CANAL.

I. Use of water by riparian proprietors.

1. What easements a company can neither grant nor become subject to by permissive user.

A company was established, by stat. 34 G. 3, c. 78, for making and maintaining a certain navigable canal; and, by sect. 113, reciting that the erection of steam-engines near to the navigation might promote its interests, it was made lawful for the owners of lands within twenty yards of the canal to draw off water sufficient to supply such engines for the sole purpose of condensing the steam used for working them; such water to be returned into the canal (allowing for inevitable waste), so that no obstruction should arise to the navigation.

The Company sued R. in case, for that he, being possessed of land within twenty yards of the canal, and of a mill and steam-engine on such land, drew water from the canal more than sufficient for the sole purpose of condensing, &c., and used the same for other purposes than that of condensing, &c., whereby plaintiffs lost and were deprived of the water. Plea, that defendant was tenant of land situate, &c., and abutting, &c., and was the occupier of a certain mill erected on the said land and abutting on the canal, and of a certain steam-engine in the said mill, being the land, mill, and engine mentioned in the declaration: and that defendant and all occupiers of the said land, mill, and engine had for twenty years used as of right, &c., the easement of drawing from time to time from

the canal such quantities of water as were necessary, for other purposes than that of condensing, &c., to wit, for the purposes of supplying the boilers of the engine with water, of generating steam to work the engine, of heating the said mill, of cleansing the boilers, and of supplying water to a certain cistern, to wit, a cistern on the roof of a certain engine-house on the said land: and that defendant, in exercise of his said right, drew off the water at the times when, &c., for the purposes aforesaid. Replication, traversing the enjoyment and right as alleged. Issue thereon. It appeared in evidence that a mill of the defendant called The Old Mill, with a steam-engine, abutting on the canal, had existed more than twenty years; that within twenty years a new mill, with another engine, had been erected, adjoining to and communicating with the Old Mill, water passing from one to the other, and the machinery of one being worked by power from the other: and that the water of the canal had been used in both mills (in the Old during more than twenty years), for the purposes mentioned in the plea except that of supplying a cistern on the roof of the engine-house; there being no cistern in that place. The jury found (in answer to questions put by the Judge) that the buildings constituted one mill, and that the user proved had been as of right; and a verdict was taken for the plaintiffs. On motion to enter a verdict for defendant:

Held, that the justification in respect of "a certain mill" was supported by the proof of defendant having occupied and used the water for the Old mill during twenty years: and that if plaintiffs meant to rely upon the more modern user in the new mill, they should have new assigned. And

That the failure of proof as to the cistern did not entitle the plaintiffs to an entire verdict on the issue joined, but that the verdict might be entered distributively, with nominal damages for the user not justified in proof.

The plaintiffs moved for judgment non obstante veredicto on the same issue, and relied upon the above Act and others establishing and regulating their canal, which gave the public a right, for the purposes of the navigation, to use the canal and the adjoining wharfs and ways, paying certain rates, empowered the company to raise money on the security of such rates, and obliged them to convey all their waste water into the Duke of Bridgewater's Canal.

Held, that the Company could not, consistently with these enactments, have granted the water for other purposes than that permitted by stat. 34 G. 3, c. 78, s. 113: that an actual grant, if proved, for the purposes mentioned in the plea, would have been illegal and no justification: and, therefore, That the grant for such purposes, implied from twenty

years' user, was no legal defence to this action. Judgment for plaintiffs, non obstante veredicto. *Rockdale Canal Company v. Radcliffe*, 287

2. Construction of clauses permitting use for certain purposes, 287. Ante, 1.

II. Powers of making works.

Whether they can be exercised after the power to make compensation for injury has become extinct, 531. COMPENSATION, I.

CARRIER.

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Contract for hauling and carriage when entire and where complete, 785. COUNTRY COURT, II.

CERTAINTY.

In pleading, 2. ASSURANCE, I.

CERTIFICATE.

I. On application for beerhouse license, 687. BEER, I.

II. Of shares, 728, 736. COMPANY, I. 1, III. 1.

CERTIORARI.

I. To remove order of sessions: notice to what justices.

To interested justices whose interference is the act complained of.

During the trial of an appeal against an order of removal, at the County Quarter Sessions, which was confirmed with costs, F. S., one of the magistrates for the county, and a rated inhabitant of the appellant parish, sat on the bench, and on several occasions spoke to the chairman, and referred to documents put in evidence. The presence of F. S. being objected to, on the ground that he was an interested party, he admitted the fact; and the chairman stated that F. S. would take no part in the proceedings: but he remained in court till the decision of the appeal. No further objection was made. On motion for a certiorari, F. S. stated on affidavit, that, although he did speak to the chairman, and refer to documents, during the trial, he did not vote or give any opinion on the question before the court, or influence the decision of the other magistrates; and that, if the chairman and he had not believed that his presence on the bench, after his statement that he would not interfere, had been acquiesced in, he would have retired from the court during the trial.

Held, that his presence, under those circumstances, rendered the proceedings invalid.

The notice of application for a certiorari, under stat. 13 G. 2, c. 18, s. 5, was sworn to

"who were present at the Sessions" "when the appeal mentioned in the said notice was heard, and were and are two of the justices" "by and before whom the order of Sessions mentioned in the said notice was made." The notice was signed by J. M., "attorney for the inhabitants of" the respondent parish.

Held: 1. That the service was sufficient, inasmuch as F. S., under the circumstances, must be considered as a member of the court, and one of the justices who made the order:

2. That the signature was sufficient. *Regina v. Suffolk, Justices*, 416

II. To remove order of sessions: on what ground.

Interference of interested justice, 416. Ante, I. 421, *APPEAL*, VI. 2.

III. To remove order of sessions: signature of notice.

By "attorney for the inhabitants of," &c., 416. Ante, I.

IV. To remove indictments.

What judge may order procedendo, and how.

A Judge of any of the three superior common law Courts has jurisdiction to make an order for the issuing of a procedendo, to send back proceedings on an indictment for felony, removed by certiorari from an inferior Court: and it rests in his discretion whether such order should be made upon a summons to show cause, or immediately. *Regina v. Scarfe*, 773

V. Procedendo.

1. By what judge, 773. Ante, IV.

2. Whether with or without previous summons, 773. Ante, IV.

VI. What proceedings not revised on certiorari.

Granting of beerhouse license, 687. *BARR*, I.

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Finality of decision removing a county court judge, 173. *COUNTY COURT*, I. 1.

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Effect of promising to pay the amount without naming it, 252. *ACCOUNT STATED*, I.

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CHURCH DISCIPLINE.

I. Submission to sentence under stat. 3 & 4 Vict. c. 86, s. 6.

Sentence requiring certificates of good behaviour before suspension is taken off.

Where a beneficed clergyman charged with an offence by report of Commissioners under sect. 5 of the Church Discipline Act, 3 & 4 Vict. c. 86, consents, under sect. 6, to abide the judgment of the Bishop without further proceedings, and is thereupon sentenced to suspension from the functions and emoluments of his office for a term of years, the Bishop may lawfully make it a part of such sentence that, when the term expires, the suspended party shall produce a certificate of his good behaviour during such term, under the hands of three beneficed clergymen in his vicinity, such certificate to be approved of by the Bishop before the suspension be taken off; and that the suspension shall continue, notwithstanding the expiration of the term, until such approval. *Ex parte Rose*, 751

II. Jurisdiction as regards judgment and sentence.

Requirement of certificates of good behaviour on expiration of term of suspension, 751. Ante, I.

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II. Under an act by which certain persons or their agents are to be commissioners.

1. How and for how long such agents may be appointed, 831. *AGENT*, I. 1.

2. Who need not make previous declaration, 831. AGENT, I. 1.
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III. Tithe Commissioners. TITHE.

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COMPANIES CLAUSES ACT.

See STATUTE.

COMPANY.

I. Deed of settlement.

1. Validity of rule for forfeiture of share in case of non-execution of deed.

In the deed of settlement of a joint stock company regulated by stat. 7 & 8 Vict. c. 110, it may lawfully be made a rule that the share of any subscriber for part of the Company's capital, who shall not execute the deed within three months from its date, shall be forfeited if the directors think fit. Although no provision be made for giving the subscriber notice to execute, or notice of intention to enforce the forfeiture. And a subscriber whose shares have been declared forfeit under the rule, without any such notice, cannot maintain an action against the Company for refusing to give him certificates of his holding such shares.

It is no answer to such action that the refusal was not authorized by the Company under their seal.

Although, by stat. 7 & 8 Vict. c. 110, s. 3, a shareholder in such Company is a person who has executed the deed of settlement or a deed referring to it, the plaintiff, in an action against the Company for not permitting him to execute, need not aver that he was denied permission to execute a deed so referring: it is enough to state that he was not allowed to execute the deed. *Stewart v. Anglo-Californian Gold Mining Company*, 736

2. Effect of qualified execution, 728. Post, III. 1.
3. Pleading: averment of refusal to permit execution, 736. Ante, I. 1.
4. Execution of deed referring to deed of settlement, 736, 742. Ante, I. 1.

II. Joint stock company: registration.

1. What society does not require it, not being for any purpose of profit: loan societies.

A Society consisting of more than twenty-five shareholders raised a fund by monthly sub-

scriptions from each shareholder, out of which sums were occasionally advanced by way of loan, at 5 per cent. interest, to the highest bidder among the shareholders; the advance not to be less than 20*l.*, nor more than the amount subscribed for by him. The additional subscription paid by such highest bidder for the preference of having the loan was payable by monthly instalments; and fines were incurred in default of payment: the fines and monthly instalments, and the interest upon the loans, being added to the general fund of the Society. The repayment of the loans was secured to the Society in the names of three trustees.

Held, that the Society was not a joint stock company established "for any purpose of profit," within stat. 7 & 8 Vict. c. 110, s. 2, and might therefore make the loans in question without having obtained a certificate of complete registration. *Bear v. Bromley*, 271

2. Profit and loss in transactions subsidiary to the general purpose, 271. Ante, I. 1.

III. Registered joint stock company: certificates.

1. Execution of deed a condition precedent.

A person who has subscribed for shares in a joint stock company, completely registered under stat. 7 & 8 Vict. c. 110, is not entitled to certificates under sect. 51 till he has executed the deed of settlement or a deed referring thereto.

To state in a declaration that plaintiff executed the deed of settlement, except as to a certain specified clause, is not equivalent to alleging that he executed the deed. *Wilkinson v. Anglo-Californian Gold Mining Company*, 728

2. Refusal on the ground of forfeiture for non-execution of deed, 736. Ante, I. 1.
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1. Of scrip or shares, 736. Ante, I. 1.
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Whether they can be exercised after the power to make compensation has become extinct, 531. COMPENSATION, I.

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1. Application of to railway companies, 862. RAILWAY, I. 1.

2. Remedy where a creditor sues the company instead of proving under the acts, 862. RAILWAY, I. 1.

COMPENSATION.

I. For injury occasioned in execution of statutory powers.

Extinction of the power of compensation: Whether the power occasioning injury can be longer exercised.

By a Navigation Act the undertakers were authorized to make and maintain such navigation, and from time to time to alter their dams and weirs for that purpose; and to enter and make works upon lands for the purpose of the undertaking, first making satisfaction to the owners as Commissioners under the Act should direct. By a subsequent clause, any persons injured by the works were to receive compensation, to be assessed by the Commissioners. The Commissioners were named in the Act, and power given them to appoint successors from time to time. The navigation was made; and, as part of it, a dam across a river was enlarged. Subsequently, all the Commissioners died, without having appointed successors. The Company afterwards raised the dam to the injury of a millowner below.

Held by Wightman, Erle, and Crompton, J., that the power to alter the dam still to the millowner should not of obtaining compensation gave no opinion:

Lord Campbell, C. J., dissentiente, and holding that the compensation clause having become incapable of execution by extinction of the Commissioners, the powers which the Act had conferred upon the Company to cause injury to other persons could no longer be exercised. *Kennet and Avon Navigation Company v. Witherington*, 531

II. Covenants for, in case of bill passing.

1. Compensation when not payable unless company enters plaintiff's land.

A railway Company, promoting in Parliament a bill for the extension of their line, which extended line would pass through the lands of the plaintiff, covenanted with him as follows: "In the event of the bill hereinbefore mentioned being passed in the present session of Parliament, the said Company shall, *before they shall enter upon any part of the lands of the said Sir T. R. G.*" (plaintiff), "pay to the said Sir T. R. G., his heirs or assigns, the sum of 4900*l.*, purchase-money, for any portion of his lands, not exceeding 43 acres, which the said Company may, under the powers of their Act, require and take for the purposes of this undertaking. In addition to purchase-money as aforesaid, the said Company shall pay to the said Sir T. R. G., his heirs or assigns, *before they shall enter upon any part of the said land*, the sum of 7100*l.* as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding 43 acres to be taken by them."

Held: 1. That the Company were not bound to pay either of these sums unless they entered upon some part of the plaintiff's lands.

2. That an absolute covenant by the Company to pay these sums to the plaintiff, in a reasonable time after the passing of the Act, would have been ultra vires, and void. *Gage v. Newmarket Railway Company*, 457

2. Absolute covenant when ultra vires, 457. ANTE, I.

III. For death or injury caused by misfeasance.

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II. Of statutes.

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2. When not restricted by reference to title of act and preambles, 806. EJECTMENT.

3. Retrospective effect of limitation clause when not restricted.

Stat. 11 & 12 Vict. c. 43 (for regulation of proceedings before justices out of Sessions), enacts by sect. 11, that, where a complaint shall be laid before a justice, on which he shall have authority to grant an order, such complaint shall be made within six calendar months from the time when the matter of complaint arose. By sect. 38, the Act is to

commence and take effect seven weeks after its passing.

Held that a complaint, after the Act came into operation, upon matter which arose before, was barred by sect. 11, though six calendar months from the time when the matter of complaint arose had elapsed when the statute passed:

For, the Act having given time for preferring any such complaint before the limitation clause came into operation, no such injustice resulted from giving full effect to sect. 11 as would warrant the Court in putting upon it a restricted construction. *Regins v. Leeds and Bradford Railway Company*, 343

4. Restriction to prevent inevitable injustice, 343. Ante, 3.

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1. Effect of one of several contingencies being illegal, 224. DEVISE, III. 1.
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CONTRACT.

I. Illegality.

1. Contravention of public policy.

The South Eastern Railway Company was incorporated for the purpose of making and maintaining that railway, with power to raise moneys for the purposes of the Act. The projectors of an intended Dover and Deal, &c., railway had contemplated bringing a bill before Parliament for the establishment of such railway, but were in doubt as to whether they could do so. M., a person interested, and having once been in the South Eastern Com-

pany, that, if the projectors of the Dover, &c., Railway would proceed in endeavouring to obtain their Act, and if successful, would hand over their scheme to the South Eastern Company, that Company, if the bill were rejected, would insure them against loss by such rejection, and would pay their Parliamentary expenses. No clause in the Company's act empowered them so to apply their funds. The bill was proceeded with, and rejected by Parliament. In an action against M. on the above contract, the declaration alleging that the South Eastern Company did not insure, &c., and did not pay the Parliamentary expenses,

Held, by the Court of Exchequer Chamber on Error, that the stipulation by M. was a promise that the Company should do an act which was illegal and contravened public policy and a public statute, and that an action did not lie against M. upon such promise: and judgment, which had been given for the plaintiff below, was arrested by the Court of Error. *Macgregor v. Dover and Deal Railway Company*, 618

2. Contravention of statute, 618. Ante, 1.
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II. When presumed or implied.

1. From occupation by a corporation or its agent, 632. CORPORATION, I. 1.
2. From reissuing contract after part performance, 640. EXECUTORS, I. 1.

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1. Subscription of policy by directors of a partnership, 2. ASSURANCE, I.
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1. Clerk on behalf of trustees of turnpike road, 316. HIGHWAY, XI. 1.
2. Attorney, when held not to have contracted himself, 503. AGENT, II. 1.
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4. Railway Company, 618. Ante, I. 1. 632, CORPORATION, I. 1.

IV. Liability to stamp duty.

Exemption as relating to sale of goods: transfer of debt.

Defendant was indebted to plaintiff in 47l.; and C. & W. were indebted to defendant in 48l. By agreement between C. & W., plaintiff and defendant, the following document was delivered to plaintiff: "To Messrs. C. & W. I request you will supply Mr. C." (plaintiff) "with such parcels of Roman cement as he shall require, to the amount of 48l., and charge to the account standing with you to

my credit. R. C." (defendant). Under this was written: "To Mr. C." (plaintiff). "On the consideration above named we agree to supply to your order, when you shall require it, Roman cement to the amount of 484. C. & W."

Held, that this was an agreement relating to the sale of goods within the exemption in Schedule Part I. to stat. 55 G. 3, c. 184, and therefore did not require a stamp. *Chaffield v. Cox*, 321.

VI. Necessity for seal.

1. When not valid for want of seal may nevertheless disqualify, 526. COUNCILLOR, II.
2. Use and occupation by corporation, 632. CORPORATION, I. 1.

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Distinction as regards corporations, 632, 636. CORPORATION, I.

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Effect as a disqualification, 526. COUNCILLOR, II.

X. Entireness.

1. Contract for hauling and carriage; cause of action when and where complete, 785. COUNTRY COURT, II.
2. Effect of death and rescinding after part performance, 640. EXECUTORS, I. 1.

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1. Effect of rescinding contract after part performance, 640. EXECUTORS, I. 1.
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XII. Consideration: failure of consideration.

Dishonour of notes in which a deposit is made, 722. BANK, 1.

XIII. Warranties.

1. What description in a sold note constitutes a warranty.

Defendant, by his agent, sold plaintiffs a parcel of turnip seed, and gave the following sold note: "Mr. T. C. R." [defendant's agent]. "Sold to Messrs. B. & Co." [plaintiffs] "for Mr. C. L." [defendant], "14 quarters Skirving's Swedes at 17s. per bushel." Defendant's agent afterwards sold plaintiffs a second parcel of turnip seed, stating that it was "of the same stock" as the first parcel. No sold note was given; the invoices described it as "24½ quarters of turnips."

Held: As to the first parcel, that the jury was properly directed that the description of it in the sold note amounted to an warranty that it was Skirving's Swedes.

As to the second parcel, that the jury was not entitled to find that it was the same stock as the first, on the subsequent sale to plaintiffs, was evidence for the jury of a warranty that the second parcel also was Skirving's Swedes. *Allan v. Lake*, 560.

2. What reference to former sale evidence of a warranty, 560. Ante, I.

XIV. Powers of revocation and determination.

If subject to approval, who must show the approval, 425. APPORTIONMENT.

XV. Stipulation that a matter shall be determined by a referee.

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Subsequent letters when not admissible in construing contract contained in a former letter, 503. AGENT, II. 1.

XVII. Death.

Effect on entire contract, after part performance, 640. EXECUTORS, I. 1.

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1. When a disqualification arising de die in diem, 526. COUNCILLOR, II.
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Of proportion of tithe commutation rent charge, 393. ADJUDICATION.

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With France as to fisheries, 882. ACTION, I. 1.

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For felony.

Forfeiture of choses in action, 878. BILL, V. 1.

CORPORATION.

I. Acts of and contracts by: seal.

1. Use and occupation without contract under seal.

Where any corporation has actually used and occupied land, for a corporate purpose, by permission of the owner, it is liable in assumpsit for use and occupation, though there be no contract under seal for such occupation.

Where the corporation so occupying is a railway company, within the provision of stat. 8 & 9 Vict. c. 16, Companies Clauses Consolidation Act, 1845, sect. 97, that any contract which, if made between private persons, would be valid though made by parol only, may be made by parol on behalf of the company by the directors, and shall bind the company, such parol contract may be presumed against the company in an action for

use an-1 occupation, in the absence of direct evidence to the contrary, upon proof of actual occupation by the corporation or its agent. *Lowes v. London and North Western Railway Company*, 632

2. Effect of contract not under seal as creating a disqualifying interest, 526. *COUNTELLOR*, II.

3. Distinction between executed and executory contracts, 632, 636. *Ante*, 1.

4. Liability for wrongful acts of servants without formal authority, 736, 742. *COMPANY*, I. 1.

II. Municipal. MUNICIPAL CORPORATION.

COSTS.

I. Of witnesses.

Maintenance of party examined in his own behalf.

If a party to a cause be examined on his own behalf under stat. 14 & 15 Vict. c. 99, s. 2, the Master may allow, in taxation, for his maintenance during the time of his detention for the purpose of giving evidence, as in the case of any witness, if his testimony, in the Master's opinion, was material and necessary, and if he attended for the purpose of being examined as a witness and not merely to superintend the cause. *Howes v. Barber*, 588

II. Of first trial.

Where jury were discharged.

Where the judge trying a cause discharges the jury because they cannot agree upon their verdict, and a second trial is had, the party who then succeeds is not entitled to costs of the first trial.

And it makes no difference that counsel on both sides, upon conference, assented to the jury being discharged, when the Judge, but for such assent, would have detained them longer. *Bostock v. North Staffordshire Railway Company*, 777

III. Of action in superior Court in cases of concurrent jurisdiction with county court, 267. *APPEAL*, I.

IV. Pleading so as to include.

Plea of payment pendente lite by prior endorser, 757. *BILLS*, VII.

V. In criminal cases.

1. On criminal information. *CRIMINAL INFORMATION*.

2. Defendant's right to costs, when limited to amount of prosecutor's recognisance, 703. *CRIMINAL INFORMATION*.

COUNCILLOR.

I. Election: signature and place of r of voter.

Under stat. 5 & 6 W. 4, c. 76, s. 32, which requires the voting paper at an election of borough councillors to be signed with the name of the burgess voting, the party's usual signature is sufficient; and it is no valid objection that the Christian name is denoted only by an initial.

Such paper is correct according to sect. 32, if the place in respect of which the party votes, and for which he appears to be rated on the burgess roll, be described according to its actual situation, though the description may vary in terms from that on the burgess roll. *Regina v. Avery*, 576

II. Of borough: disqualifying interest: time of applying for quo warranto.

Under stat. 5 & 6 W. 4, c. 76, s. 28, which provides that no person shall be qualified to be elected councillor of a borough "during such time as" he has any share or interest in any contract with, or employment by or on behalf of, the council, a person who has entered into a contract with the council, and been employed by them in respect of such contract, is disqualified from holding the office, though such contract required the corporation seal, and is not sealed.

While such contract continues, the disqualification caused by it arises de die in diem; and, during that time a relator is not precluded, under stat. 7 W. 4 & 1 Vict. c. 78, s. 23, from applying for a quo warranto, though twelve calendar months have elapsed from the election of the party disqualified, or from the commencement of his disqualification. *Regina v. Francis*, 526

COUNSEL.

Consent to discharge of jury, 777. *COSTS*, II.

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I. Liabilities.

1. Liability to repair bridges, 841. *BRIDGE*, I. 1.

2. Liability to expense of pauper lunatics, 563. *POOR*, XIII.

II. County rate.

Effect of conventional arrangements by justices at Quarter Sessions, 841. *BRIDGE*, I. 1.

III. Sessions.

Appellate jurisdiction, 861. *POOR*, XII.

COUNTY COURT.

I. County court judge: removal for inability and misbehaviour.

1. Rule for quo warranto against successor when refused.

Application was made for a quo warranto against a county court judge, on the relation of a person who had held the office immediately before him, and who had been removed for inability and misbehaviour by the Chancellor of the Duchy of Lancaster, under stat. 9 & 10 Vict. c. 95, s. 18.

It appeared that, on a memorial addressed to the Chancellor, charging the relator with general misbehaviour, and particularising one instance more strongly, and praying for his dismissal, the Chancellor had held an inquiry, which was attended by the relator and his counsel, and had heard evidence on the charges, not on oath or affirmation, and within a few days after the close of the inquiry, had dismissed the relator by an instrument finding inability and misbehaviour, but not specifying any particular instance. Affidavits denying the inability and misbehaviour in the cases adduced on the inquiry, and generally, were put in.

This Court refused the rule, it not appearing that the relator had not been fully heard, or that the charges, if true, did not show inability and misbehaviour; and the decision of the Chancellor being therefore final. And the Court held it not necessary that, after the inquiry had closed, a fresh notice to the relator should have been given, to show cause against his being dismissed. *Ex parte Ramsay*, 173

2. Proceedings with a view to removal, 173. Ante, 1.

3. Finality of decision, 173. Ante, 1.

II. Jurisdiction: cause of action when and where complete.

On contract for hauling and carriage of goods.

Plaintiff, a carrier and wharfinger at Swindon, agreed in writing with defendant, living in Surrey, to carry his timber by barge to London, at 16s. per ton, including all charges but wharfage. It was necessary to haul the timber from the place where it lay to the wharf; and plaintiff provided horses for the purpose when defendant's horses were absent. Plaintiff sued in the Swindon county court for the balance of his account for the carriage, including a separate charge for hauling.

Held, on motion for a prohibition, that the hauling and the carriage formed one cause of action; that such cause of action was not complete until the timber was delivered in London; and that therefore the judge of the county court had not jurisdiction under stat. 9 & 10 Vict. c. 95, s. 60. *Barnes v. Marshall*, 786

III. Costs of action in superior court: concurrent jurisdiction.

Application to judge or court: appeal from decision of judge, 257. *APPEAL, I.*

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Jurisdiction.

When not ousted by covenant of apportionment.

COVENANT

I. What runs with the land

1. Covenant to repair, named.

Declaration in covenant assignee of lessee, set lessee, for himself, his administrators, and assigns would take the premises ten years, and would lessee, his executors and assigns at his and their own tenable repair the premises, having been valued at 400l., the valued repairs sent dilapidations of but not on the stem by lessor, his heirs and assigns: as should have been; his executors, administrators, and assigns would at his and their time repair and the demised premises timber but not on premises; the timber at the expense of administrators, premises so repair the possession yield up to lessee term; and should commit any waste the land in accordance to the count then by assignment by and was possession term.

Breach: Time of making ready as for lessee, at expiration of term to provide demised premises not on the premises put into tenement and although the said premises the said premises repaired suffered repair, at the term

signment, cross-cropped the land and did waste, and used and cultivated the land in a bad and unhusbandlike manner, and not according to the custom of the country.

Defendant pleaded, among other pleas, as to suffering the premises to be ruinous and out of repair, and so leaving them: That lessor did not at any time from the assignment till the expiration of the term provide on the premises sufficient rough timber, not on the stem, to enable defendant to repair, nor any rough timber whatever. And he demurred specially to the declaration. Plaintiff demurred to the plea.

Held that the declaration was good: For

1. The covenant to put in repair ran with the land, and bound the assignee, though the lessee, in this part of the deed, covenanted only for himself and his executors and administrators. And that the payment of 400*l.* to the lessee was no ground for construing this covenant as limited to him personally.

2. It was sufficient, on this record, to aver that the lessor was always ready and willing to furnish timber, without stating that he actually did furnish it.

3. A covenant to yield up in repair at the end of a term runs with the land and binds an assignee, though not named.

4. Breach of a covenant to cultivate according to the custom of the country is sufficiently averred by stating that defendant did not so cultivate, without specifying instances.

Held also that the plea was bad, for that the condition precedent to the defendant's obligation to repair was sufficiently performed if he was ready and willing to supply timber when required. *Martyn v. Clue*, 661

2. Covenant to yield up in repair though assignee not named, 661. Ante, 1.

II. With a view to passing of an act of Parliament.

1. Absolute covenant for compensation when ultra vires, 457. COMPENSATION, II. 1.
2. What imports the necessity for some entry, 457. COMPENSATION, II. 1.

III. For employment and service.

Stipulations as to pension on revocation or resignation: burthen of showing adequate cause, 425. APPORTIONMENT.

IV. Prospective covenant for reference.

1. When it does not oust Court of jurisdiction, 425. APPORTIONMENT.
2. Burthen of showing judgment of referee, 425. APPORTIONMENT.

V. Pleading.

Breach of covenant to cultivate according to custom of country, 661. I. 1.

COVERTURE.
See BARON AND FEME.

CRIMINAL INFORMATION.

Costs to defendant.

Amount, and how recovered.

Under stat. 4 & 5 W. & M. c. 18, s. 2, a defendant in a criminal information which is not tried, or in which a verdict is given for the defendant, is entitled only to such an amount of costs as equals the amount of the prosecutor's recognisance.

Semble, That the proper mode of obtaining such costs is for the defendant to take out a side bar rule for taxing the whole costs; and, upon that being done, he is entitled to so much of them as equals the amount of the recognisance. *Regina v. Savile*, 703

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I. Offences by statute.

Effect of repeal pending prosecution, 761. STATUTE, III.

II. Certiorari.

Procedendo: by what judge, and how, 773. CERTIORARI, IV.

III. Appearance of defendant at the trial.

How secured by recognisance. *Reg. Gen.* 251

IV. Costs to defendant.

1. When limited by prosecutor's recognisance, 703. CRIMINAL INFORMATION.
2. Side bar rule to tax, 703. CRIMINAL INFORMATION.

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Plea puis darrein continuance of payment by prior endorser, 757. BILLS, VII.

DEATH.

I. By misfeasance: remedy under stat. 9 & 10 Vict. c. 93.

Measure of damages.

In an action, under stat. 9 & 10 Vict. c. 93, by the wife, husband, parent, or child of a person killed by misfeasance, the jury, in estimating damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only.

And, the Judge, in such a case, having left it in the option of the jury to give damages on all or any of these grounds, though intimating his opinion that there was no ascertainable damage on any ground but the last, a new trial was granted for misdirection.

Decisions of the Scotch Court are received as authority here, if the law on which they turn be common to England and Scotland. *Blake v. Midland Railway Company*, 93

II. Of contractor after part performance of entire contract, 640. EXECUTORS, I. 1.

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I. What are mutual debts, 857. EXECUTORS, II.

II. Transfer of, 321. CONTRACT, V.

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I. Buying off opposition in Insolvent Court, 443. BILLS, IV.

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1. For injury occasioned by breach of fishery regulations, 882. ACTION, I. 1.

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3. Against surety of treasurer of Building Society, 277. BUILDING SOCIETY, I.

4. On agreement in case a railway bill pass to pay landowner a certain sum as compensation before entering his land, 457. COMPENSATION, II. 1.

5. Against directors of non-registered company on a policy of assurance, 2. ASSURANCE, I.

6. In action against registered joint stock company for not delivering certificates for shares, 728, 736. COMPANY, I. 1, III. 1.

7. In action against joint stock company for refusing to permit shareholder to execute deed of settlement, 736. COMPANY, I. 1.

8. For taking water out of canal for purposes not authorized by statute, 287. CANAL, I. 1.

9. In action for compensation to family of a person killed by misfeasance, 93. DEATH, I.

II. Previous to acting as a commissioner.

Who need not make it, and when, 831. AGENT, I. 1.

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Execution.

1. Cannot be in part only, 728, 731. COMPANY, III. 1.

2. Execution of deed referring to deed of settlement, 736, 742. COMPANY, I. 1.

3. Action for refusal to permit execution, 736. COMPANY, I. 1.

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In making application to the Court, 257. APPEAL, I.

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See LANDLORD AND TENANT.

DEPOSIT.

Of notes of country bank, 722. BANK, I.

DESCRIPTION.

Of place of rating in voting paper, 576. COUNCILLOR, I.

DEVISE.

I. Alteration by codicil.

1. Revocation when only partial, the old limitations being merely postponed to the new ones.

Devise:

I give to my son, J. D., during his natural life, nine freehold houses, &c.; and, from and after his decease, I give the said houses unto his children, &c. (if sons, on their attaining the age of 23, if daughters, of 21), their heirs, &c., as tenants in common; and, in case he has only one child, to such one child (on attaining age, as before), his or her heirs, &c. And, in case all the children of my said son shall die under the age, &c. (as before), then I give the before-mentioned premises to my daughters, S., A. and E. M., during their respective natural lives, in equal shares; and, upon the decease of my said three daughters, the share of each of them so dying unto her children, &c., their heirs, &c., or child, &c. (with provision as to age as before); and, in case of the death of any of my said daughters without having a son who shall attain, &c., or a daughter who shall attain, &c. (the specified ages), I give such share as such child or children would have had to the child or children of my other two

and, if only one daughter leaves issue that shall attain, &c., then the whole of the said premises to such issue, if more than one, in equal shares, as tenants in common, &c., their heirs, &c.; if only one, to such one, &c.

Codicil :

I hereby revoke that part of my will whereby I give nine freehold houses, &c., to my son J. D. and his heirs, and my will is that my daughters A. and E. M. should enjoy them. I hereby give the said freehold houses to my said daughters A. and E. M. equally and jointly between them, and to the survivor of them, and, after their decease, to their child or children equally, and, if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will. A. and E. M. died, leaving no issue. A son of J. D. and children of S., the third sister, survived.

Held that the codicil did not entirely revoke the devise to J. D., but only postponed him to the two sisters, A. and E. M., and that, on the decease of both without issue, he, and not the children of S., became entitled; and that, if the devise to J. D. had been revoked by the codicil, the children of S. could not take under the will, because the contingency on which she was to take according to the devise had not happened. *Doe dem. Evers v. Ward*, 197

2. How far revocation shall operate, 197.
Ante, 1.

II. What devise of realty shall pass leaseholds.

1. Reference to place under stat. 17 W. 4 & 1 Vict. c. 26, s. 26.

Testator, by his will, made in 1815, but confirmed by a codicil in 1841 (see stat. 1 Vict. c. 26, s. 34), after directing payment of his debts and funeral and testamentary expenses, and giving certain annuities, with which he charged his real estate, and certain legacies, bequeathed "all the rest, residue, and remainder" of his "personal estate, goods, and chattels, whatsoever and where-soever," to his brother M. "absolutely to and for his own use and benefit." He then devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being at or near," &c., in the county, &c., "and a parcel of land purchased by me" of M. L. at, &c., in the county, &c., "and all other my real estates in the said counties of," &c., "and elsewhere in Great Britain, and all my estate and interest therein," to trustees, to hold the same (subject to the said annuities) to the use of his said brother M. for life, remainder to the issue of the said M. in tail male; in default of such issue, to W. E. and his heirs.

decease, testator was possessed of freehold estates in both the said counties, and of lands held under certain church leases in one of them, which had been, according to the usual practice of the lessors, renewed every seven years. These leaseholds were distinct from, but near, and, in some places, contiguous to, the freeholds; some of them were let and occupied with the freeholds, at undivided yearly rents. Cottages, ornamental and otherwise, were built upon part; and on part were buildings occupied by labourers employed upon the freehold estates.

Held, that, under stat. 7 W. 4 & 1 Vict. c. 26, s. 26, the leasehold estates in question passed under the general devise of the realty, there being no contrary intention apparent on the will. *Wilson v. Eden*, 474

2. What does not show contrary intention, 474. Ante, 1.

III. Limitation on contingency.

1. What executory devise in default of children attaining an age above that of twenty-one is void for remoteness.

D. (by will made before 1838) devised land to his daughter E. for her life, and, from and immediately after her decease, to such of her children as she might have, if a son or sons, who should live to the age of twenty-three years, if a daughter or daughters, who should live to the age of twenty-one years, and their heirs, as tenants in common: in case of the death of a son under twenty-three or a daughter under twenty-one, the share of such child to go to the surviving children attaining the ages named, and their heirs, as tenants in common; or, if only one should attain the age, to such child in fee: in case all the children of E. should die under the ages named, or if she should have none, then to D.'s daughter A. for life, and, upon her decease, to her children, if a son or sons, living to attain the age of twenty-three years, if a daughter or daughters, living to the age of twenty-one years, and their heirs, as tenants in common; and, if only one child, to such child in fee: "And, further, in case of the death of" A. "without leaving a child, if a son, who shall live to attain the age of twenty-three years, or, if a daughter, who shall live to attain the age of twenty-one years" (not adding an express provision for the event of A. having no child), "I give the part and parts such children or child would be entitled to as aforesaid to J." After D.'s death, E. died without having had a child; and afterwards A. died without having had a child.

Held, by the Court of Q. B., that the limitation over to J. might take effect as a contingent remainder upon A.'s death without leaving a child attaining the age named.

Held, by the Court of Exchequer Chamber, reversing this judgment, that the limitation over was not to be considered as expectant upon either event, of A. dying childless, or her dying without leaving a child that should attain the age, but upon the single event (however it might happen) of her dying without leaving a child that should attain the age, and was therefore an executory devise void for remoteness. *Doc dam. Evere v. Challis*, 324.

2. Limitation contingent on failure of a line of devisees how affected by revocation of the devise to that line, 197. *Ante*, I. 1.

3. What is a contingent remainder in default of children attaining a certain age, 224. *Ante*, I.

IV. Failure of children.

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V. General principles of construction.

1. The devise must be legal as it would be read at the time of testator's death, 224. *Ante*, III. 1.

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Discretionary powers of Court.

1. To grant commission to examine a party on his own behalf, 490. *WITNESS*, I. 1.

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Disqualifying interest, 526. *COUNCILLOR*, II.

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On plea justifying the taking of

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Principle of ascertaining rateable value of docks extending into several parishes, 325. *Poor*, I.

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I. What is.

Distinction between an easement and an occupation, 795. *OCCUPATION*, I.

II. How acquired.

1. What water rights not to be acquired either by express grant or user, 267. *CANAL*, I. 1.

2. Exclusion of certain periods, 568. *WAY*.

3. Grant of license, when to be exercised only once, 813. *LICENSE*.

III. Excess.

How far it affects the rights of the owner of the dominant tenement.

Plaintiff, being reversioner of a house which adjoined premises in the occupation of defendant and had ancient windows, rebuilt the house, added an upper story, opened windows in that story, and enlarged the ancient windows and otherwise altered their position: such rebuilding and alterations being within twenty years of the commencement of the action. Defendant subsequently rebuilt his premises, and thereby darkened the windows in both the upper and the lower stories of plaintiff's house.

Held, in an action by plaintiff, as reversioner, for this obstruction, that, the plaintiff having, by his alterations, exceeded the limits of his right, and it being, through the nature of such alterations, impossible for the defendant, in the lawful exercise of his own rights, to obstruct such excess without at the same time obstructing the plaintiff's former right, the plaintiff must be considered as losing his former right, at all events until he restored his house to its original condition.

Semble, that such alteration did not destroy the right altogether.

Held, further, that a defence founded upon the fact of such alteration by the plaintiff, and the impossibility of a partial obstruction, was properly raised under a traverse of plaintiff's right to the windows. *Rees v. Bess*, 112.

IV. Pleading and evidence.

1. Justification as to "a certain mill" where a new mill has been added to the old one, 267. *CANAL*, I. 1.

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V. Particular easements.

1. Ancient lights, 112. Ante, III.
2. See also WAY, WATERCOURSE.

EAST INDIA COMPANY.

Mandamus to pay military officer, when refused.

An officer commanding forces of Her Majesty and of The East India Company, in India, has no such legal right, by statute or otherwise, to his pay, as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus compelling upon the Company to discharge arrears; though he has always received his pay from the Company, and their practice has been to discharge it monthly. *Ex parte Napier*, 622

EJECTMENT.

Habere facias possessionem returnable immediately.

The provision in stat. 3 & 4 W. 4, c. 67, s. 2, that "all writs of execution may be tested on the day which the same are issued, and be made returnable immediately after execution thereof," extends to writs of habere facias possessionem, the enacting words being plain, and neither the title of the Act nor the preambles of sects. 1, 2, affording sufficient ground for restricting the clause to actions merely personal. *Doe dem. Hudson v. Roe*, 806

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- I. By holder of instrument in ambiguous form, 471. BILLS, I.
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I. Competency of witness. WITNESS.

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1. Explanation of mistake in fact, 722. BANK, I.
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I. Writs of: teste and return.

What may be made returnable immediately 806. EJECTMENT.

II. When void as against assignees.

From omission to file order, 316. BANKRUPT, II.

EXECUTORS AND ADMINISTRATORS.

I. Contracts pending at the time of the death.

1. Entire contract for work completed by administrator under a new agreement.

A. declared as administrator of B., stating that defendant, in B.'s lifetime, was indebted to B. in money to be paid by defendant to B. on request. It was proved that B. had contracted with defendant, in writing, to do certain works for him for 400*l.*, to be paid upon completion of the works: B. died before their completion; and A., before he had taken out letters of administration, agreed with defendant to complete, and did complete, the works.

Held, that these facts did not support the declaration, inasmuch as, the contract being entire, and the works unfinished at B.'s death, no debt accrued from defendant to B. in B.'s lifetime; although the new agreement with A. amounted, as between him and defendant, to a rescinding of the original contract, which would entitle A., as administrator, to sue on a quantum meruit in respect of the work done by B. *Crosthwaite v. Gardner*, 640

2. Effect of rescinding after the death, 640. Ante, I.

3. Promissory note in hands of testator and bequeathed as a specific legacy, 878. BILLS, V. I.

II. Set-off by.

What debts are mutual.

An executor sued, as such, for a debt which accrued to the plaintiff from the testator in

his lifetime, may set off a debt for money had and received to defendant's use, as executor, and money due on an account stated with him as executor, since the death of the testator; such debts being mutual, within stat. 2 G. 2, c. 22, s. 13. *Mardell v. Thelluson*, 857. Since overruled, see note (a).

III. Legacies.

Effect of forfeiture by felony of legatee, 878.
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IV. Pleading.

On cause of action not complete at the time of the death, 640. *Ante*, I. 1.

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Forfeiture of legacy, 878. BILLS, V. 1.

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Of Chancellor's decision on a memorial charging County Court Judge with misbehaviour, 175. *COUNTY COURT*, I. 1.

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1. Remedy for injury occasioned by breach of regulations, 882. *ACTION*, I. 1.
2. Obligation to show lights, 882, 884. *ACTION*, I. 1.

II. Pleading.

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1. Effect on legacies, 878. BILLS, V. 1.
2. Executor when trustee for Crown, 878. BILLS, V. 1.

II. Of shares in joint stock company, 734. *COMPANY*, I. 1.

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Decisions on enactments as applied to other societies, 277. *BUILDING SOCIETY*, I.

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II. Not guilty. *NOT GUILTY*.

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Sale of. *VENDORS AND PURCHASERS*.

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Not where actual grant would be illegal, 237. *CANAL*, I. 1.

HABEAS CORPUS.

Ad subjiciendum.

On application of husband for custody of wife, 781. *BARON AND FEME*, I.

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Page 806. *EJECTMENT*.

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What constitutes a complete hearing on a memorial charging county court judge with inability and misbehaviour, 173. *COUNTY COURT*, I. 1.

HIGHWAY.

I. What is a highway.

Over a place which is not a thoroughfare. Trespass for entering plaintiff's close and pulling down a wall therein. Plea: That the close was a public pavement within the Metropolitan Paving Act, 57 G. 3, c. xxix.; that plaintiff, unlawfully and contrary to the Act, erected there a said wall; and, the pavement, and because defendant's request, is

remove the same, defendant entered and pulled it down.

Held, on motion for judgment Non obstante verdicto, that the plea was bad for not showing that it was absolutely necessary for defendant, in order to exercise the alleged right of passage, to remove the wall.

A public highway may, in law, exist over a place which is not a thoroughfare. Whether, in fact, it does exist, is a question for the jury. *Bateman v. Bluck*, 870

II. Points on highways dedicated but not repairable under Highway Act.

1. The dedicating landowner not liable to repair it.

When a road has been dedicated to the public by a landowner, but the conditions have not yet been fulfilled which make it repairable by the parish under stat. 5 & 6 W. 4, c. 50, s. 23, the landowner is not liable to repair it; and, consequently, he is not the "person having the management" of such road within the Railways Clauses Consolidation Act, 1845 (9 & 10 Vict. c. 20), s. 57: although, since the dedication, he has voluntarily done some repairs, made a sewer and drains, and granted permission to persons desiring to open communications with the sewers, or interfere with the road; and no one else has, in these respects or any other, managed or exercised control over the road or sewers.

Such dedicator cannot, therefore, recover penalties, under sect. 57 of the Railways Clauses Act, against a Railway Company who have made a cut across such road, rendering it impassable, and have not in due time restored the communication.

Quære whether the Company could be indicted for the obstruction of such a way by severing and not restoring it. *Regina v. Wilson*, 348

2. The dedicating landowner not the "person having the management," 348. Ante, 1.

3. The dedicating landowner cannot recover penalties from Railway Company for not restoring, 348. Ante, 1.

4. Liability of Railway Company in respect of, 348. Ante, 1.

III. Repair in towns under acts incorporating the Towns Improvement Clauses Act.

Joint liability of districts previously separate.

Before the passing of the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, the borough of A. was divided into a town and a country district, each maintaining its own highways. That Act was incorporated in stat. 12 & 13 Vict. c. xxxv. (for the improvement of the borough of A.), except so far as anything in the former Act was varied or otherwise provided for by this. By the same

Act, sects. 20, 24, the mayor, aldermen and burgesses of A. were empowered to cause any street in the borough of A. to be sewered and paved, at the expense of the adjoining landowners, and certify the same, when completed, to be a public highway: and sect. 25 enacted that it should be lawful for them from time to time to make a rate for the maintenance of such highways upon the occupiers of all houses, &c., and lands "within the said borough." Stat. 10 & 11 Vict. c. 34, s. 48, enacts that the Commissioners (that is the persons or body corporate intrusted to execute any local improvement Act incorporated with this) shall be the surveyors of all highways within the limits of such local Act, and shall have, within those limits, all the powers of surveyors; and that the inhabitants of the district within those limits shall not be liable to highway rate in respect of roads within other parts of the parish, &c., in which the said district is situate. By sect. 49, the Commissioners are to be indictable for non-repair of any public highway within the limits of such local Act, in the same manner as the inhabitants thereof or of any parish, &c., or other district therein were liable before the passing of such Act.

Held that the mayor, aldermen, and burgesses of A. were bound, as Commissioners under the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, to rate the whole borough for the repair of highways paved and certified under sects. 20, 24, of the local Act, and likewise to rate the whole for repair of the public highways not so paved and certified. And that a rate upon the country district alone, for repair of the highways within it (not paved or certified), was bad. *Slater v. Ashton under Lyne, Mayor, &c.*, 398

IV. Liability to repair by statute.

Effect of repeal after indictment and before plea, 761. STATUTE, III.

V. Liability to repair highway out of the district.

1. As to the necessity for showing consideration, 761. STATUTE, III.

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VI. Surveyors.

1. Mayor, aldermen, &c., as commissioners under local act, 398. Ante, III.

2. Election: poll how to be taken, 716. VESTRY, I. 1.

VII. Rates.

On what district, 398. Ante, III.

VIII. Removal of obstructions.

Not by private individual without necessity, 870. Ante, I.

IX. Evidence.

Effect of showing continued repairs of road out of district, 761. *STATUTE*, III.

X. See also Bridge.

TURNPIKE ROADS.

XI. Letting of tolls.

1. Validity of contract by clerk.

Sect. 57 of stat. 3 G. 4, c. 126, provides that "all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees" "letting such tolls," "or by their clerk or treasurer," shall be valid, "notwithstanding the same may not be by deed or under seal."

Held: 1. That an agreement for the letting of tolls signed by the clerk to the trustees, and stating that by that agreement he, "on behalf of the trustees," did "agree to let," and the lessee did agree to take, the tolls and toll-house for two years, was made according to sect. 57; the clerk having authority, by the statute, to contract, as well as to sign on behalf of the trustees.

2. That stat. 8 & 9 Vict. c. 106, s. 3, which provides that "a lease, required by law to be in writing, of any tenements or hereditaments," shall be void at law unless made by deed, does not apply to agreements for the lease of tolls under stat. 3 G. 4, c. 126. *Shepherd v. Hodeman*, 316

3. Need not be by deed, 316. *Ante*, I.

XII. Trustees.

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VII. From use and occupation, 632. *CORPORATION*, I. 1.

IMPRISONMENT.

I. On criminal charge on suspicion.

What facts warranting belief a defendant not being a peace officer must show in his plea.

To a count in trespass for assaulting and falsely imprisoning plaintiff, and putting him in irons, defendant pleaded: That he was commander of one of the Queen's ships of war, at sea; that plaintiff, at the times when, &c., was steward of the ship, and, as such, was servant to defendant on board the said ship, and had access to his cabin, and had the charge of his goods and chattels there; that on two occasions, just before the times when, &c., moneys had been feloniously stolen from defendant's possession out of a desk then being in his said cabin; that upon each occasion the desk had been clandestinely opened by means of a key, and the plaintiff had access to and could have obtained the key of the said desk and unlocked the same and taken away the said moneys; and defendant then believed that no other person had or could have obtained access to the key of the said desk without plaintiff's knowledge; Wherefore defendant, having probable cause of suspicion, and suspecting the plaintiff for, among other things, the causes aforesaid, to have been guilty of the stealing, &c., did, as such commander, and as he lawfully might for the cause aforesaid, gently lay hands, &c., and put plaintiff in irons, and so keep him (the same being a reasonable mode of detainer) for a reasonable time until defendant, as commander, &c., could examine into the circumstances of suspicion against plaintiff according to law and for the purpose of reporting to the Lords of the Admiralty or bringing plaintiff to trial, if it appeared right to do so. *Replication*, De *Injuris*.

After verdict for defendant on this plea, Held, on motion for judgment non obstante veredicto,

That in an action for false imprisonment on a criminal charge by a person not being a peace officer, mere belief is not a sufficient justification, but facts must be shown on which the belief was grounded, in order that the

Court may judge whether or not the defendant had probable cause for arresting. That all the facts need not be set out, but only enough to show ground of reasonable suspicion. That the facts alleged here were sufficient, at least after verdict; and per Lord Campbell, C. J., they would have been so on demurrer.

And that, if the plaintiff meant to contend that the facts did not justify putting in irons as a mode of detainer, he should have new assigned. *Broughton v. Jackson*, 378

III. New assignment.

When necessary, 378. *Ante*, I.

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What reference to a year not sufficient to make the tenancy one for a year.

Premises were let from 19th April, 1841, at the yearly rent of 42*l.*, payable quarterly, the first payment of 7*l.* 13*s.* 6*d.*, to be made on 24th June, 1841, being the proportion down to that date; the tenant to hold and enjoy, &c., at the said rent, until one of the said parties should give the other six calendar months' notice to quit; the tenant to leave the said premises in as good condition as at the date of the agreement.

Held, that notice might be given to quit at the expiration of any six months after June 24th; and that a notice on 24th June for 25th December, 1841, was good. *De dem. King v. Grafton*, 496

III. Term.

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Liberty to make and amend a goit.

Lands, partly adjoining a river, were demised for 999 years, by indenture, in which the lessor granted to the lessee liberty to cut a goit or sluice out of the said river, at a proper and convenient distance above a certain weir, in the most convenient line through certain closes (named) of the lessor, into a close, intended for a mill dam, part of the demised lands; and from time to time and at any time to turn the water of the river through the said goit: And liberty, from time to time, and at all times during the term, to view, examine, carry, and lay down materials, and repair and amend the said goit or sluice (and other works specified), when so made as aforesaid, or any of them, when and as often as need or occasion should be, making reasonable satisfaction to the lessor, his heirs and assigns, for all damage to be done or occasioned thereby to the grass or herbage of the lessor, &c.: And the lessee covenanted that he, his executors, &c., would make reasonable satisfaction to the lessor, his heirs and assigns, for all damages to be occasioned to the lands of the lessor by the lessee, his executors, &c., in exercise of any of the liberties, privileges, and powers by the indenture granted, except for the term of two years next ensuing the commencement of the rent, during which time no trespass or damage should be charged or paid for.

In an action of trespass against the lessee for widening a goit on the lessor's soil to the extent of nine additional feet, the defendant

made of a sufficient width, and having been completed to a small and insufficient width only, viz. nine feet, so that, without widening it as after mentioned, defendant could not enjoy the demised tenement as she was entitled by the indenture to do, he, on, &c., in further due exercise, &c., cut down the sides of the goit and widened it: justifying the alleged trespasses.

Replication: that, before the expiration of two years, &c., and before the times when, &c., viz., on, &c., the lessee, in due exercise of the liberty, &c., made and completed a goit, being the goit in the plea mentioned, of the width therein mentioned; and the same remained and was used by the lessee continually from the last-mentioned day until defendant, under colour of the indenture, committed the alleged trespasses.

Held by the Court of Queen's Bench, on demurrer to the replication, that the privilege given to defendant by the deed was to make a goit once only, and that, after having completed a goit, he could not justify entering plaintiff's land again and widening the goit from nine feet to eighteen: For that the power to make a goit was exhausted, and the widening was not a repairing or amending within the meaning of the deed. Judgment for plaintiff.

Judgment of Queen's Bench affirmed in Exchequer Chamber. *Bostock v. Sidebottom*, 813.

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II. Of highway, 870. HIGHWAY, I.

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I. Of land: for purposes of rating.

Occupation by water pipes.

Paving Commissioners, appointed under a
local Act, 11 G. 2, c. 12, were empowered, by
sect 36, to make rates upon all persons who
"shall inhabit, hold, occupy, possess, or en-
joy any land, house, shop, warehouse, cellar,
vault, or other tenements or hereditaments
within any of the said streets, squares," &c.,
of a certain district; such rate not to exceed
1s. 2d. in the pound of the yearly rents or
value of such of the said lands, houses, &c.,
situate in any of the said streets, squares,
&c., the greater part of which should be
paved in a certain manner, and not to ex-
ceed 9d. or 6d. in the pound, respectively, for
such of the said lands, houses, &c., situate,
&c., the greater part of which should be
paved in a certain other manner, or only
repaired under the Act. Different assess-
ments were provided for public buildings,
dead walls, and vacant ground adjoining the
said streets, squares, &c., and for unoccupied
houses. No specific assessment was provided
for water pipes laid down in the district.
The Commissioners, in whom the paving ma-
terials of the said streets, squares, &c., were
expressly vested by the Act, were empowered
to alter the position of the pipes belonging
to any water or gas company, underneath
such streets, squares, &c.

Held, that an incorporated water Company,
whose mains, pipes, and other apparatus were
laid down within the district, were liable,
under sect 36, to be rated as occupiers of
land. *Reg. v. East London Waterworks*, 705

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1. In pleading probable cause, 378. **IMPRISONMENT, I.**
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At vestry meeting, 718. **VESTRY, I. 1.**

POOR.

I. Poor-rate: rateable value of works extending into several parishes.

Where one toll entitles to use of the whole, acreage principle.

The Hull Dock Co----- were proprietors

under successive Acts of Parliament. The docks communicated with each other, and with the river Humber, and extended into several parishes. Every vessel paid a single toll, which became due on entry into the docks and was paid then, or on clearance outwards; and she was entitled by such payment to go into any one or more of the docks at the will of her own master, or under the direction of the Company's harbour master, who had certain powers for regulating the position of vessels. All the payments, at whatever dock received, were carried to one general account.

Held that the poor-rate upon so much of the docks as lay in any parish must be assessed, not according to the actual receipts in that parish, but to the proportion which the area of docks within that parish bore to the entire area of the docks. For that, in such a case, an assessment on the acreage principle was unavoidable; though an assessment on the basis of earnings within the parish is preferable where the nature of the case permits it. *Regina v. Hull Dock Company,* 325

II. Poor-rate: rateable occupation.

Waterpipes, 705. **OCCUPATION, I.**

III. Union, liabilities of.

For expense of pauper lunatics, 553. **POOR, XIV.**

IV. Overseers, collateral duties.

Granting certificates to applicants for beer-house licenses, 687. **BEER, I.**

V. Overseers' expenditure: contested appeals.

1. As to acting with or without authority of vestry.

The overseers of a parish, at a vestry meeting held for the purpose, assessed a railway Company at 2708*l.* The Company gave notice of appeal. At a subsequent vestry it was decided that the assessment should be reduced to 2000*l.*, and that, if the Company refused that compromise, the overseers should take such proceedings as they might be advised were necessary. The Company appealed: and the then overseers, without calling a vestry meeting, contested the appeal. The Sessions reduced the rate to 300*l.*, subject to a case for the Queen's Bench. The case was not sent up, the overseers having arranged with the Company that the rate should be fixed at 450*l.* The Poor Law Auditor disallowed the expenses of contesting the appeal, on two grounds: 1. That the overseers should have called a vestry meeting to determine whether the appeal should be contested; 2. That they should, after the decision at Sessions, have summoned a vestry to determine whether the case for the Queen's Bench should be pro-

ceeded on. The expenses in question were, after the audit, sanctioned by the inhabitants at a vestry meeting.

Held, that the overseers were not bound to summon a vestry meeting before contesting the appeal or abandoning the case reserved; and that, as the auditor did not allege that what they had done was inexpedient or that they had acted mala fide, the grounds of disallowance were bad. *Regina v. Street*, 682

2. Auditor's disallowance, when quashed, 682. *Ante*, I.

VI. Auditor.

His disallowance when quashed, 682. *Ante*, V. I.

VII. Settlement by renting a tenement.

1. Occupation and payment of rent in cases of joint tenancy.

A separate and distinct dwelling-house and land in the parish of H. were let to William A. and Thomas A. as joint tenants, the rent and value of the land, taken separately, being sufficient to confer a settlement on both. The farm was occupied by William, Thomas residing on another farm at a distance. Thomas paid the whole rent of the farm. The overseers of H. had always demanded and received payment of the rates in respect of the house and farm in question from Thomas: and, in the rate-books of H., "Atkinson, Mr.," appeared as the name of the occupier of the farm in two rates, and "Atkinson, Thomas," in a third.

Held, that the Sessions were justified in finding, First, that there was a sufficient occupation and payment of rent by William, and a sufficient assessment of him and payment of the rates by him, to give him a settlement in H. under stats. 1 W. 4, c. 18, and 4 & 5 W. 4, c. 76; and, Secondly, that he had been sufficiently charged with, and paid his share of, the public taxes of H. to gain a settlement under stat. 3 & 4 W. & M. c. 11. *Regina v. Huethwaite*, 447

2. Assessment and payment of rates in cases of joint tenancy, 447. *Ante*, VII.

VIII. Settlement by parochial taxation.

Evidence of charge and payment in cases of joint tenancy, 447. *Ante*, VII. I.

IX. Notice of appeal, sending by post.

Notice at what time deemed to have been given.

Under stat. 11 & 12 Vict. c. 81, s. 9, which provides that a period of fourteen days after

course of post, it ought to have reached the party to whom it is sent, though in fact it arrive by the post on a later day. *Regina v. Staunton*, 358

X. Trial of appeal.

Interference of interested justice and the consequences, 416. *CERTIORARI*, I.

XI. Case reserved.

Abandonment without consent of vestry, 682. *Ante*, V. I.

XII. Lunatic pauper, appeal against order of maintenance.

To sessions of what jurisdiction.

Where an order is made by two county justices, under stat. 8 & 9 Vict. c. 126, s. 62, for the maintenance of a lunatic pauper removed to the county asylum from a borough within the county, having a separate Court of Quarter Sessions, the appeal against such order lies exclusively to the borough Quarter Sessions. *Regina v. Lancashire Justice*, 361

XIII. Lunatic pauper, whether union or county liable to expenses.

Irishman irremovable by five years' residence.

Under stat. 12 & 13 Vict. c. 103, s. 5, if a pauper lunatic, born in Ireland and having no English settlement, is removed to an asylum after five years' residence in a parish in England from which, if sane, he would have been irremovable by stat. 9 & 10 Vict. c. 64, the union, not the county, is liable to the expenses of his removal and maintenance. *Regina v. Arnold*, 533

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1. When exhausted, 813. *LUCKER*.
2. When act of parliament authorises execution by agent, 831. *AGENT*, I. I.
3. Contract ultra vires, 457. *COMPENSATION*, II. I. 618, *CONTRACT*, I.

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- I. Time of applying for.
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- II. Against county court judge, when refused,
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- I. Dissolution and winding-up of Company.
1. Retrospective application of winding-up
acts.

The Joint Stock Companies Winding-up
Amendment Act, 1849 (12 & 13 Vict. c. 108),
excepts, by sect. 1, from the application of the
Joint Stock Companies Winding-up Act, 1843
(11 & 12 Vict. c. 45), railway companies in-
corporated by Act of Parliament. The Aban-
donment of Railways Act, 1850 (13 & 14 Vict.
c. 83), s. 30, enacts that, notwithstanding
such provision, the two first-mentioned Acts
shall apply to any such incorporated railway
company in respect of which an order for
winding it up may have been made before
the passing of The Joint Stock Companies
Winding-up Amendment Act, 1849, and that
the proceedings for winding up the same shall
proceed and be carried on under the Winding-
up Acts of 1848 and 1849, or either of them.
Per Lord Campbell, C. J.: stat. 13 & 14 Vict.
c. 83, is retrospective, and renders valid pro-
ceedings taken, before the passing of this
Act, for the dissolution of a railway company
incorporated by statute.

The omission by a creditor of a railway
company to prove his debt before the Master,
under The Joint Stock Companies Winding-
up Act, 1848, sect. 73, cannot be pleaded in
bar to an action against the Company by such
creditor. The proper mode of stopping the
action is to apply, under that section, for a
Judge's order to stay proceedings until proof
be made. *Mackenzie v. The Stigo and Shan-
non Railway Company*, 862

- 2. Remedy where creditor omits to prove
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- II. Liabilities with respect to highways.

With respect to highways dedicated but not
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III. Compensation to landowner.

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Absolute covenant to pay compensation to landowner without reference to entering his lands or not, 457. **COMPENSATION, II 1.**

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II. Poor rate. POOR.

III. Highway rate, 398. HIGHWAY, III.

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Effect on pending prosecutions.

By Act of Parliament, the liability to repair certain highways in a parish was taken from the parish and cast upon certain townships in which the highways respectively were; and the Act gave a form of indictment against such townships for non-repair, which would have been insufficient at common law. One of the townships was indicted under the Act, but, before trial, the Act was repealed without any reference to depending prosecutions. The Court arrested a judgment given against the township on such indictment.

Quære whether, on indictment against inhabitants of a district, charging them with liability to repair a highway out of the dis-

trict, it is necessary to prove a specific consideration for such liability; or whether consideration is to be inferred from the fact of repair, without other evidence. *Regina v. Devon, Inhabitants*, 761

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I. Powers of commissioners to determine pending suits.

1. Not between rival claimants of tithes.

The Tithe Commissioners have no power, under stat. 6 & 7 W. 4, c. 71, ss. 45, 50, to determine a suit pending between two rival claimants of tithes; inasmuch as the words "touching the right to any tithes," in sect. 45, refer only to suits which raise questions as to the titheability of particular lands, not to those which bring into question the right of particular parties to tithes of which the existence is admitted: And, further, because a suit raising only a question of title between two claimants of tithes is not a "difference" "whereby the making" of the award by the Commissioners is "hindered," within the meaning of sect. 45. *Shepherd v. Londonderry, Marquis*, 145

2. What questions between improprator and vicar do not hinder the making of an award.

Mandamus, directed to the Tithe Commissioners, alleged that they had proceeded to effect a commutation of the tithes of the parish of H.; and that, during the proceedings, certain differences, whereby the making of their award was hindered, arose between landowners in the parish and the vicar, viz., whether certain old enclosed lands were exempt from the render of great tithes in kind, and of tithes of wool and lamb in kind, or, if not so exempt, whether they were subject only to the payment of 1s. per acre

great tithes in kind, and of tithes of wool and lamb in kind. The writ commanded the Commissioners to hear and determine the said differences.

Return: That at a former meeting of the Commissioners, for the purpose of awarding the amount of rent-charge payable by a township of the said parish, the vicar claimed the tithes of lamb and wool, the impropriate rector protesting against such claim, and the landowners contending that by an agreement, confirmed by a decree in Chancery in 1699, all the tithes of the parish had been commuted. That at a subsequent meeting, the Commissioners having given notice that it would be held for the hearing and determining certain differences whereby the making of their award was alleged to be hindered, the vicar proposed that his title to the tithes of wool and lamb should be tried by a feigned issue, the Commissioners first awarding the amount of rent-charge to be paid in lieu of them to the party entitled; that the landowners insisted that the tithes of lamb and wool had been extinguished by agreement and by decree in Chancery, and that a difference existed between the landowners, vicar, and improprator concerning the said tithes; and they called upon the Commissioners to determine the question. That it was then arranged that, if the parties would not consent to try as above, the landowners might apply for a mandamus to the Commissioners to try the question whether the said tithes belonged to the vicar or to the landowners as improprators of the tithes of their respective lands. The return also stated that the said question, raised at the last-mentioned meeting, was one of title. It then set out a bill in Chancery, filed in 1812 by the then vicar against certain landowners, for subtraction of tithes, in which the question was raised whether the lands of the parish were ever liable to pay tithes of lamb and wool to the vicar; and also a decree in the said suit, in 1817 (by which it appeared that the defendants therein contended that by an agreement, confirmed by decree of Chancery in 1699, part of certain enclosed lands was allotted to the vicar in lieu of all tithes arising to him from the said lands, and by a further agreement, in 1707, the landowners agreed to pay the vicar 1½d. per acre in lieu of all small tithes throughout the parish), which decree of 1817 ordered the master to take account of the tithes of wool and lamb, as due to the vicar, dismissing his bill as to tithes of hay. The return then stated a bill in Chancery, filed in 1819, by the impropriate rectors against the vicar, claiming the tithes of wool and lamb, which bill was dismissed with costs.

of the vicar to tithes of lamb and wool, declined to comply with a requisition of the landowners, calling on them to confirm the agreements of 1699 and 1707, under stat. 6 & 6 Vict. c. 54, s. 7, and refused to decide the question of title. That, in 1845, the said landowners obtained a mandamus to confirm the agreements and decide the differences pending, and that, on return made, and demurrer, judgment was given for the Commissioners. That the assistant Commissioner, in 1850, made his award, which, after a fortnight's notice to the landowners, to give them an opportunity of advancing any further claim, was confirmed; and which awarded that all titheable lands in the parish were subject to payment of all tithes in kind, that certain persons therein named were impropriators respectively of the great tithes in the parish, and that the vicar for the time being was in possession of the tithes of wool and lamb, and entitled to the residue of the tithes; and awarded certain rent-charges, in lieu of tithes, to the impropriators, and to the vicar "or to the party lawfully entitled," in lieu of tithes of wool and lamb, and of the said residue of tithes.

Held, on demurrer to this return, that, upon the whole record, the question raised was purely a question of title between the impropriator and the vicar, and that no difference existed between the landowners and the vicar which hindered the making of the award and which the Commissioners were therefore bound to hear and determine.

Quere, whether the writ was not bad, as raising, on the face of it, a question of title. *Regina v. Tithe Commissioners*, 156

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I. Powers of governing body with respect to tradesmen dealing with persons in statu pupillari.

The governing body of a University may lawfully issue a decree that every tradesman with whom a person in statu pupillari within the University contracts a debt exceeding 5*l*. shall make the same known to the tutor of such person's college, on pain of being discommuned if he omits doing so: and in case of disobedience, they may enforce such decree by ordering that no person in statu pupillari shall deal with the tradesman for a given period.

If the Vice-Chancellor, attended, on summons, by the Heads of Colleges, makes an order to discommune, in pursuance of such decree, this is not a judicial proceeding which the Superior Courts can restrain by prohibition.

It makes no difference, as to these points, that the decree contains other distinct regulations which it requires licensed victuallers to comply with on pain of being deprived of their licenses.

The proceeding for the purpose of discommuning does not become judicial by the Vice-Chancellor, through his officer, giving notice to the party complained of that the meeting will be held at a given time and place, and summoning him or giving him liberty to attend, for the purpose of answering the complaint or offering explanation: nor is the party entitled, on that account, to demand admittance for his attorney. *Ex parte Deane*, 647

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I. Mode of voting.

1. Poll of persons present when conclusive.

At a vestry, held under stat. 58 G. 3, c. 69, for the purpose of electing surveyors of highways, of which public notice had been given, it was agreed that the vote should be taken by a show of hands, leaving it open to any one to propose that the votes should be taken according to the statute. A. and B. were respectively proposed and seconded for the office of surveyor; and, on a show of hands, A. had a majority. It was then proposed and

being so taken, B. had a majority, and was declared duly elected. A. then demanded a poll of the whole parish.

Held that, the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; that the election of B. was valid; and that a mandamus for another meeting to elect would not lie. *Regina v. Hillingdon*, 718

2. Poll of whole parish when to be demanded, 718. *Ante*, I.

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- II. What is a repairing or amending, 813. LICENSE.

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Under stat. 2 & 3 W. 4, c. 71, ss. 7, 8, the time during which the servient tenement has been under lease for a term exceeding three years is to be excluded from the computation of a forty years' enjoyment, but not from the computation of an enjoyment for twenty years.

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1. To examine parties: discretion of Court.

A commission may be granted under stat. 1 Wm. 4, c. 22, s. 4, to examine a party to a suit, resident abroad, on his own behalf. But the Court may, in its discretion, refuse such commission, if sufficient ground be not shown for requiring it.

And this Court refused a commission where the only specific ground assigned was that the parties were resident, and one carrying on business in distant places abroad (Leghorn and Constantinople), and that they made the application *bonâ fide*. *Castelli v. Groom*,

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2. What must be shown on applying for commission to examine parties on their own behalf, 490. *Ante*, 1.

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THE END.



